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# Larry Rosen: A Case Study In Understanding (and Enforcing) the GPL



timothy posted 2 days ago | from the he-actually-wrote-the-book dept.

Irosen (attorney Lawrence Rosen) writes with a response to an article that appeared on Opensource.com late last month, detailing a court case that arose between Versata Software and Ameriprise Financial Services; part of the resulting dispute hinges on Versata's use of GPL'd software (parsing utility VTD-X, from Ximpleware), though without acknowledging the license. According to the article's author, attorney Aaron Williamson (former staff attorney for the Software Freedom Law Center), "Lawyers for commercial software vendors have feared a claim like this for essentially the entire 20-odd-year lifetime of the GPL: a vendor incorporates some GPL-licensed code into a product—maybe naively, maybe willfully—and could be compelled to freely license the entire product as a result. The documents filed by Amerprise in the case reflect this fearful atmosphere, adopting the classically fear-mongering characterization of the GPL as a 'viral' license that 'infects' its host and 'requires it to become open source, too." Rosen writes:

I want to acknowledge Aaron's main points: This lawsuit challenges certain assumptions about GPLv2 licensing, and it also emphasizes the effects of patents on the FOSS (and commercial) software ecosystem. I also want to acknowledge that I have been consulted as an expert by the plaintiff in this litigation (Ximpleware vs. Versata, et al.) and so some of what I say below they may also say in court.

Read on for the rest (and Williamson's article, too, for a better understanding of this reaction to it). An important take-away: it's not just the license that matters.

Let's be open about the facts here. Ximpleware worked diligently over many years to create certain valuable software. The author posted his source code on SourceForge. He offered the software under GPLv2. He also offered that software under commercial licenses. And he sought and received and provided notice of United States patent claims related to that software.

Unbeknownst to Ximpleware, Versata took that GPLv2 software and incorporated it into Versata products – without disclosing that GPLv2 software or in any other way honoring the terms of the GPLv2 license. The reason Ximpleware became aware of that GPLv2 breach is because some months ago Versata and one of its customers, Ameriprise, became embroiled in their own litigation. The breach of GPLv2 came out during discovery.

Ximpleware has terminated that license as to Versata. This is exactly what the Software Freedom Conservancy and others do when confronted by GPL breaches.

That earlier litigation is between two (or more) commercial companies; it is not a FOSS problem. These are mature, sophisticated, profitable companies that have the wherewithal to protect themselves. I know in my own law practice, whether I represent software vendors or their commercial customers, we typically provide for some level of indemnification. Perhaps Ameriprise and the other customer-defendants can count on

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reflected in Aaron Williamson's article:

- 1. The notion of "implied patent licensing" has no clear legal precedent in any software licensing. While it is true that goods one purchases include a patent license under what is known as the "exhaustion doctrine," there is no exhaustion of patented software when copies are made (even though copying of the software itself is authorized by GPLv2). For example, a typical commercial patent license nowadays might include a royalty for each Android phone manufactured and sold. Companies that distribute Android phones and its FOSS software acquire patent licenses so recipients of their phones are indeed free to use those phones. But that isn't because of some implied patent licenses that come with Android software, but because commercial companies who distribute phones pay for those patent rights, directly or indirectly. I think it is entirely reasonable to require commercial companies to get their patent licenses in writing.
- 2. Versata's customers who received the (in breach!) GPLv2 software all moved to dismiss Ximpleware's infringement claims against them, pointing to Section 0 of GPLv2, which says, "[t]he act of running the Program is not restricted." What that sentence actually means is just what it says: The GPLv2 copyright grant itself (which is all there is in GPLv2) does not restrict the act of running the program. Nor could it; that is a true statement because running a program is not one of the enumerated copyright rights subject to a copyright license (17 USC 106). The authors of the GPL licenses have themselves made that argument repeatedly: The use of software is simply not a copyright issue.
- 3. Because there are U.S. patent claims on this Ximpleware software, Section 7 of GPLv2 prohibits its distribution under that license in the United States (or any jurisdictions where patent claims restrict its use). If Ameriprise and the other defendants were outside the U.S. where the Ximpleware patents don't apply, then GPLv2 would indeed be sufficient for that use. But inside the U.S. those customers are not authorized and they cannot rely on an assumed patent grant in GPLv2. Otherwise GPLv2 Section 7 would be an irrelevant provision. Reread it carefully if you doubt this.

The Versata customers certainly cannot depend on an implied patent license received indirectly through a vendor who was in breach of GPLv2 since the beginning – and still is! Versata ignored and failed to disclose to its own customers Ximpleware's patent notices concerning that GPLv2 software, but those patents are nevertheless infringed.

Should we forgive commercial companies who fail to undertake honest compliance with the GPL? Should we forgive their customers who aren't diligent in acquiring their software from diligent vendors?

As Aaron Williamson suggests, we shouldn't ignore the implications of this case. After all, the creator of Ximpleware software made his source code freely available under GPLv2 and posted clear notices to potential commercial customers of his U.S. patents and of his commercial licensing options. Lots of small (and large!) open source commercial companies do that. Although it is ultimately up to the courts to decide this case, from a FOSS point of view Ximpleware is the good guy here!

There is rich detail about this matter that will come out during litigation. Please don't criticize until you

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Rosenlaw & Einschlag (Irosen@rosenlaw.com)"

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## ▼ Happy Tuesday From The Golden Girls (0, Offtopic)

Anonymous Coward | 2 days ago | (#47656475)

Thank you for being a friend

Traveled down the road and back again

Your heart is true, you're a pal and a cosmonaut.

And if you threw a party

Invited everyone you knew

You would see the biggest gift would be from me

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#### **▼** Software patents (-1)

Anonymous Coward | 2 days ago | **(#47656491)** 

GPL would not be needed if software patents did not exist in the first place.



#### ▼ Re:Software patents (1)

preaction (1526109) | 2 days ago | (#47656577)

You'd need to get rid of copyright too, which the GPL uses to enforce its provisions.



### ▼ Re:Software patents (4, Insightful)

Kaz Kylheku (1484) | 2 days ago | (#47656595)

That unfortunate statement betrays a serious misunderstanding of copyright, patents, and the nature of software.



#### ▼ Re:Software patents (4, Informative)

jonbryce (703250) | 2 days ago | (#47656651)

Yes it would. RMS invented the GPL because of copyright issues, and before software patents became a problem.



## ▼ Specifically: problems with public domaining. (5, Informative)

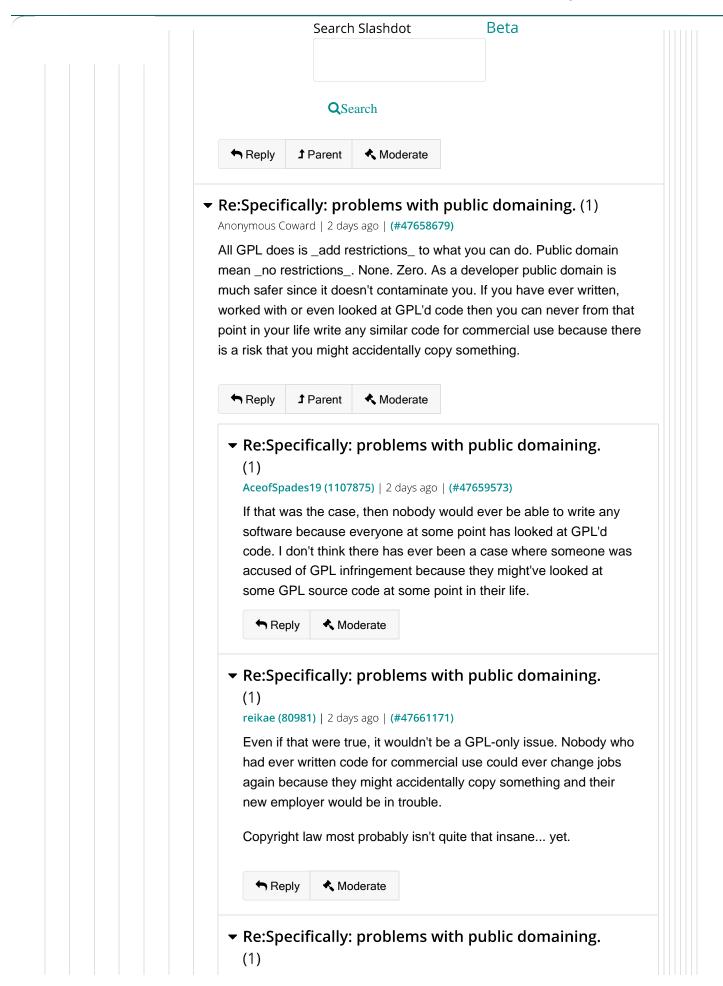
Ungrounded Lightning (62228) | 2 days ago | (#47657347)

RMS invented the GPL because of copyright issues, and before software patents became a problem.

As I understand it: It was a (brilliant) workaround for two problems with putting software in the public domain, which releases ALL rights:

- Derived works: Somebody makes a modified version and copyrights that. They do a bugfix or enhancement and even the original author is locked out of his own software's future. He can't do the same bugfix or a similar enhancement without violating the new copyright. Similarly with other users of the software.

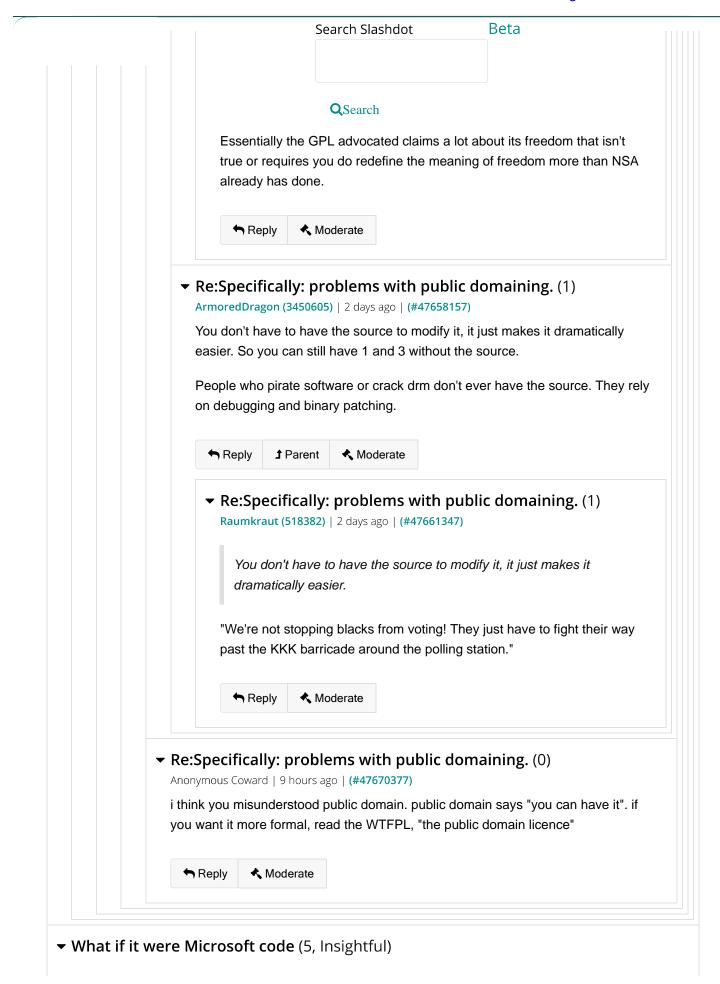
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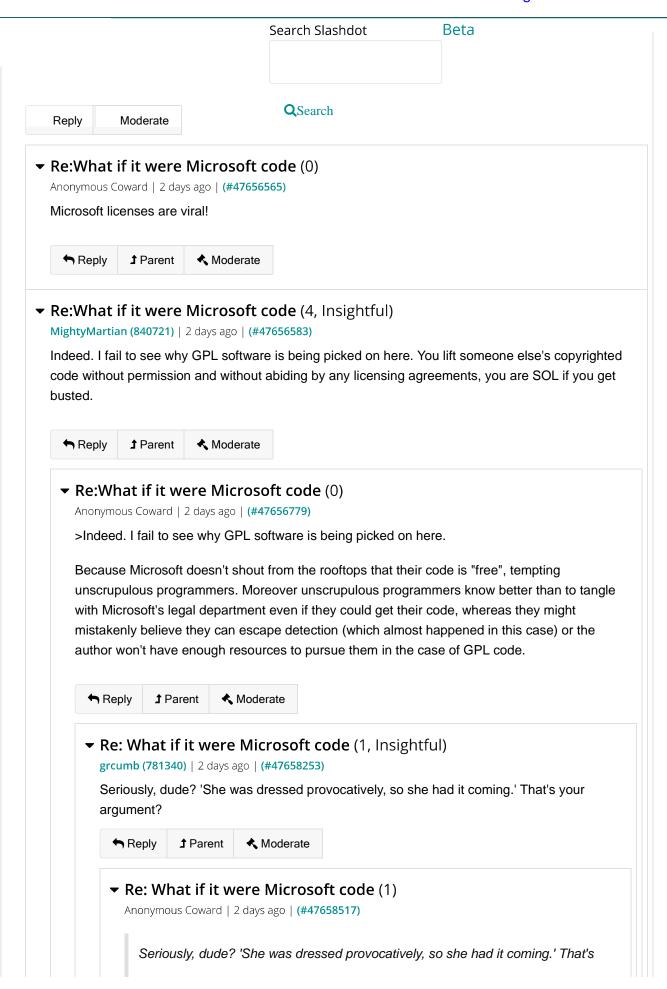


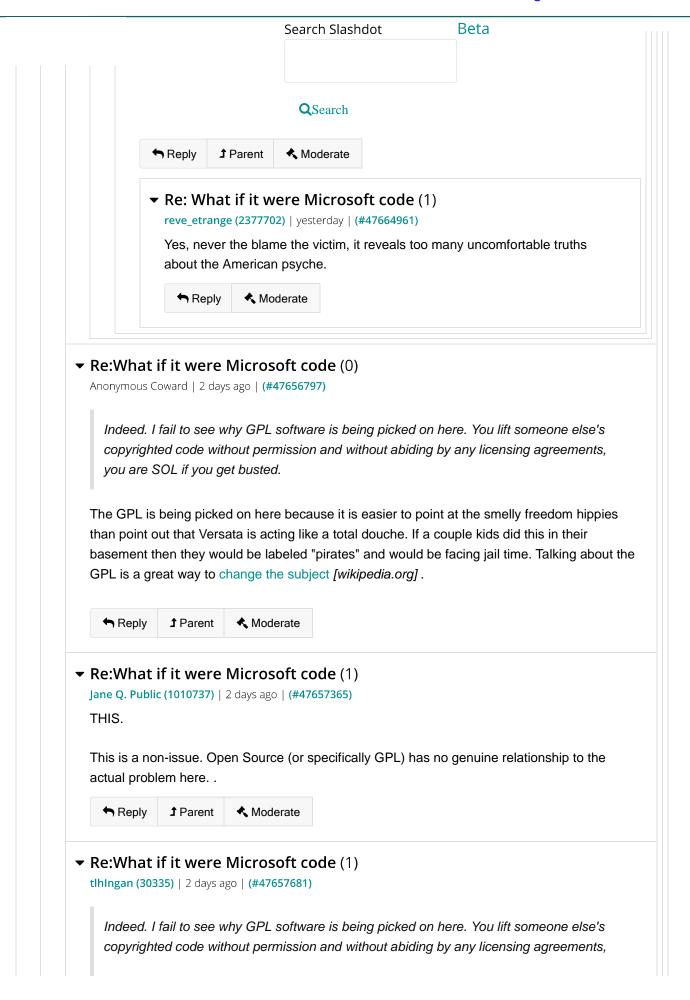
## Search Slashdot Beta **Q**Search not cover functionality, API, ABI or any but the most literal and direct of language ports. Second, as a developer, the GPL protects my rights in ways that public domain cannot. If I release a piece of code under the GPL, I remain free to grant or sell other licenses to my software as I please. At the same time, if users wish to release modifications of my software without acquiring another license, then they must also release the source for those modifications. I am then able to learn from their development efforts, and if I choose, integrate those changes into my source tree. Similarly, if users want to link my software as a library, then they must release the code for their software, too. If I do want to allow users to be able to link my code without having to release theirs, for example because my code is Fintended for use as a library, then I can use the LGPL to allow that. To all the other devs out there, do yourself a favor and spend 30 minutes reading about the commonly used licensing strategies on Wikipedia. It's not scary and you can choose the license that best suits Hyour tastes and the intended uses of your software. Hyou put in the hard time on that code and you have the right to restrict use or modification if that's what you want. A Reply Moderate ▼ Re:Specifically: problems with public domaining. (0) Anonymous Coward | 2 days ago | (#47661405) The GPL guarantees that you have those freedoms, public domain does not. Nowhere in GPL does it say that you have to distribute the code to everyone. It only forces you do distribute the source to those you send the binary to. Freedom 0 is disputable and Freedom 2 and Freedom 3 are heavily conditioned. As for public domain in doesn't enforce Freedom 1 if you only release the binary. If you on the other hand release the source code under public

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domain Freedom 0 - 3 are all enforced. Someone can create a derivate and distribute but they can't prevent you from using the original source.







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you, vendor B took GPL code D to implement feature C, making program A now GPL, unknown to you because vendor B took GPL'd code to add feature C.

So now your program A is GPL.

That's the nightmare scenario - someone basically pirated GPL code and forces your closed-source code to be GPL.

And it's happened to Microsoft before - they contracted someone to write the ISO-USB tool to write Windows OS ISOs to a USB stick for USB installs. Microsoft immediately took it down (they didn't know someone used a GPL'd library, so took it down when they learned of the breach), then figured out the whole licensing mess and posted it back up with full GPL sources.

That works in some cases, like this one, where Microsoft didn't care about the tool. But in this story, they couldn't GPL their main app for many legitimate reasons.

And that was one of the many thorny issues in this case.

The second is the fact that the GPL'd software contained patented items. (In theory, the GPL does state that using the code provides a license to those patents, but that expires when the license is revoked), so now the use of that code is also a patent infringement case - does the GPL confer users the right to use patented code if they follow the GPL?

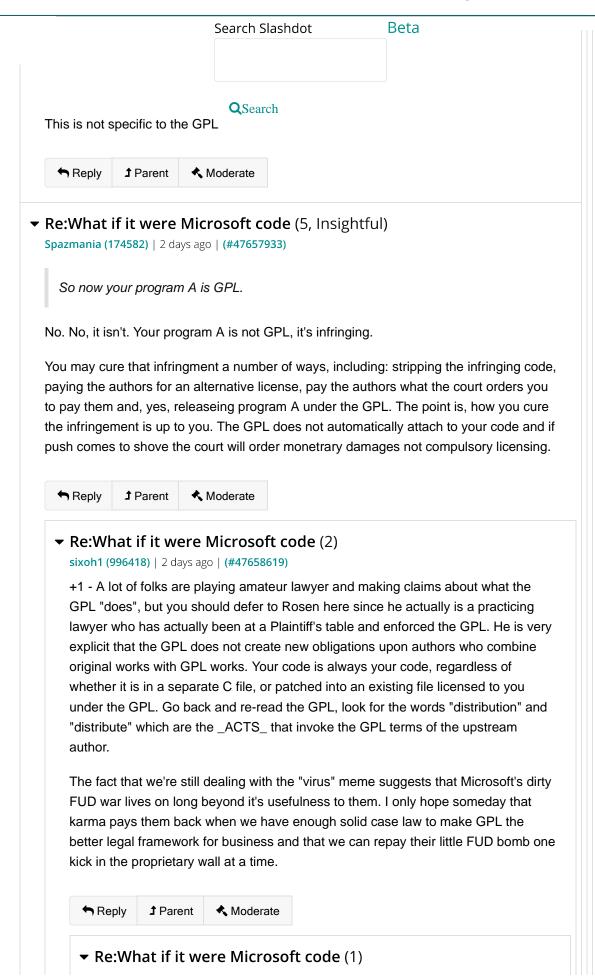
In the end, it's a really messy situation involve patent infringement, GPL violations by a third party incorporated into your code, and other stuff. Commercial software license violations typically are far more quiet and it just boils down to contract law on who really violated the license or who was in the wrong.

This one adds the GPL into the mix and also adds stuff like "what is distribution?".

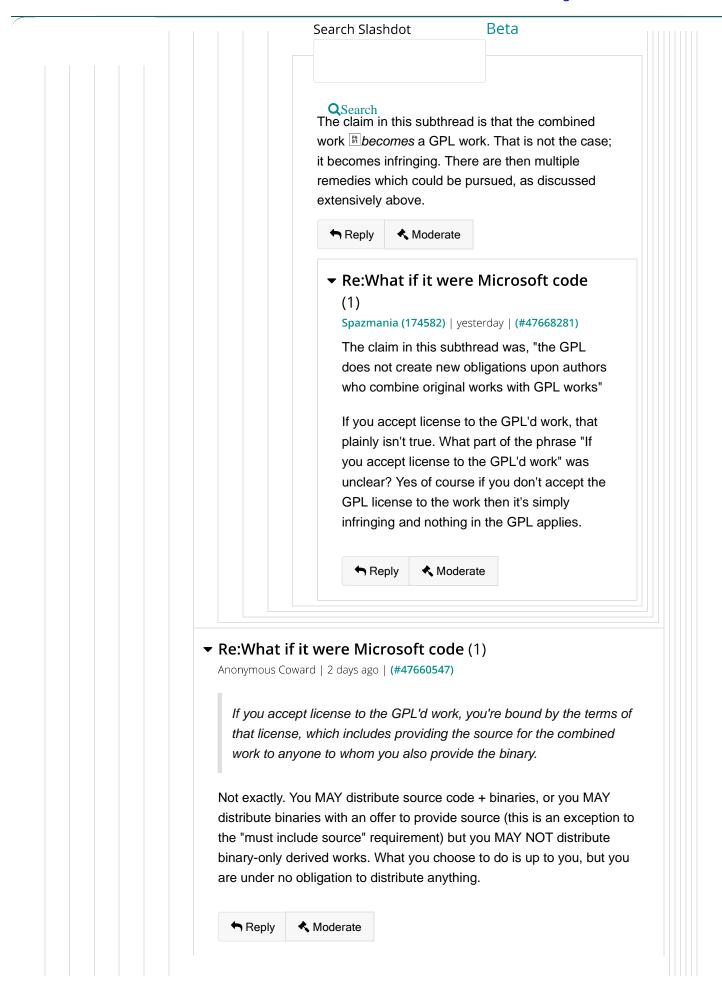
The real problem was the lack of legal oversight - for too long too many companies assumed the GPL and FOSS were "free" and all that and people just used the code willy-nilly. Yet if they licensed third-party software, what immediately happens is the license terms are reviewed by Legal to ensure they will be no problems using the code.

Only after the GPLv3 came out have companies started applying the same discipline to FOSS like they do to commercially-licensed code. Sure it means having to go to legal before you can use that nifty tool you found, but it protects everything in the end to have ALL code license-checked, even if it means wasting weeks of time before you can use it.



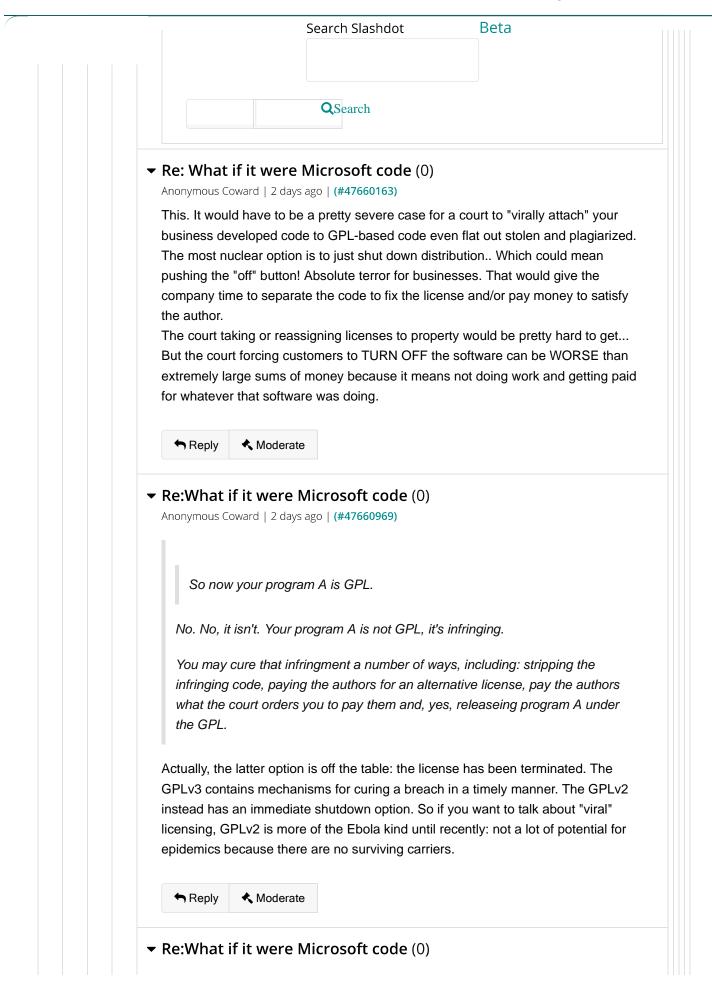


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QSearch  That isn't true either. If you accept license to the GPL'd work, you're bound by
the terms of that license, which includes providing the source for the combined work to anyone to whom you also provide the binary. The terms of the license can be enforced against you by anyone the license empowers to do so namely anybody to whom you directly provided the binary code.  In tlhIngan's scenario, you never knew about the GPL'd work thus could not have agreed to the license. That makes it unwitting infringement copyright
and patent law apply, but the GPL does not.  • Reply • Parent • Moderate
<ul> <li>Re:What if it were Microsoft code (1)         Anonymous Coward   2 days ago   (#47659303)     </li> <li>Most people just say IANAL, instead of proving it so convincingly. How about you actually defer to a real lawyer on this one.</li> <li>Reply</li></ul>
Explain the error in the reasoning (preferably referencing case law) or STFU.
♠ Reply     ♠ Moderate
<ul> <li>▼ Re:What if it were Microsoft code (1)         reve_etrange (2377702)   yesterday   (#47664993)     </li> <li>The error is that the source of the combined work does not have to be released if either A) the GPL code is removed from the work or B) the author of the combined work obtains an alternate license from the owner of the GPL code.</li> <li>♠ Reply</li> <li>♠ Moderate</li> </ul>
▼ Re:What if it were Microsoft code (1) Spazmania (174582)   yesterday   (#47665807) Ignoratio elenchi.



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or hash out some agreement with the Licensors (GPL authors) of some sort, but relicensing simply is not automatic, as frusturating as it might seem.
Reply Moderate
▼ Re:What if it were Microsoft code (0)
Anonymous Coward   yesterday   (#47669029)
That isn't true either. If you accept license to the GPL'd work, you're bound by the terms of that license, which includes providing the source for the combined work to anyone to whom you also provide the binary. The terms of the license can be enforced against you by anyone the license empowers to do so namely anybody to whom you directly provided the binary code.  That is blatantly wrong. The end user has no standing. Licenses are between the owner of the licensed work and the user of said work (the creator of the derivative), the end user is not the programmer of the original code so they would be summarily dismissed from court due to lack of standing.
➡ Reply  ♣ Moderate
▼ Re:What if it were Microsoft code (1)
Spazmania (174582)   5 hours ago   (#47672339)
The recipient of the derivative work can enforce the GPL license
between himself and the creator the derviative work. Said license
came into effect as a result of the creator's acceptance of the GPL when he received the original work and its subsequent distribution.
The end user has no standing against the creator of the original
work that license is between the original creator and the derivative creator. But he most certainly has standing in his license
with the derivative creator which the derivative creator is shown to
have established as a result of his acceptance of the GPL from the original creator.
Only if the creator of the derivative work accepted the GPL license of course. If he didn't then the work is simply infringing and the GPL does not come into play at all.

Search Slashdot Beta **Q**Search Anonymous Coward | 2 days ago | (#47659439) You may cure that infringment a number of ways, including: stripping the infringing code, paying the authors for an alternative license, pay the authors what the court orders you to pay them and, yes, releaseing program A under the GPL. The point is, how you cure the infringement is up to you. The GPL does not automatically attach to your code and if push comes to shove the court will order monetrary damages not compulsory licensing. If the code is only available via GPL, how can you "pay the authors for an alternative license"? Plus, isn't it true that you likely can't even find all of the authors? Doesn't stripping the infringing code require you to essentially go out of business while you rewrite what could be a significant chunk of your program? Heck, Samsung lost a huge patent case against Apple, and was NOT stopped from selling their infringing products. Reply Moderate ▼ Re:What if it were Microsoft code (1) **Spazmania (174582)** | 2 days ago | **(#47660191)** In the time between the authors filing a suit and the court entering a judgement you can write your way around any GPL infringement that isn't your whole product. After which you take your lumps for the past activity... which amounts to paying the authors who sued. Reply Moderate ▼ Re:What if it were Microsoft code (0) Anonymous Coward | yesterday | (#47662121) > If the code is only available via GPL, how can you "pay the authors for an alternative license"? You can ask them to dual-license it. They may agree or may decline. Otherwise you have no rights to the code except what the GPL offers, it's that simple. Most people who complain about the GPL are just annoyed that they can't simply use the code however they want since it's "open." They want the right



Roger W Moore (538166) | 2 days ago | (#47658529)

I think it's the nightmare scenario.

True but this is not specific to GPL at all. What has happened is company A bought code from company B and company B did not have all the correct permissions and licenses under both copyright and patent law to sell that code to them. It's true that company A is now stuck because they cannot sell any product which includes that code but this would be true regardless of whether company B violated the GPL or other license.

If anything company A has more options with the GPL that they would with a proprietary license: if they lack the money to pay for a commercial license for the code for all the copies they have sold then they can choose to release their source code under the GPL as well. Note that it is an **option** only and not required. The code is infringing and there are two ways to fix this: pay damages and ongoing license fees or release the source code. With a commercial license you would only have the first of these options.



#### ▼ Re:GPL more Flexible in this Situtation (0)

Anonymous Coward | 2 days ago | (#47661031)

It's true that company A is now stuck because they cannot sell any product which includes that code but this would be true regardless of whether company B violated the GPL or other license.

- Step 1: Contact the copyright holder of the GPL'd part of the software
- Step 2: Buy a version of the code with an alternative license.
- Step 3: Sue company B for the amount the proper license cost you since they should have performed step 1 and 2 as part of the original purchase.

If it is clear who do copyright holder of the GPL'd code is it should be solvable. If it isn't clear then company A can countersue those trying to enforce GPL since it's

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▼ Re:What if it were N siames (1099)   2 days ago	` '	
	,	It is no less harmful if B takes
•	· ·	ou are now potentially on the hook
for more than each copy	of A was sold for.	
Reply  Moderate		

#### **▼ Re:What if it were Microsoft code** (2, Insightful)

Kaz Kylheku (1484) | 2 days ago | (#47656635)

The difference is that the code is distributed for free. No judge is going to award damages for the redistribution of something that is free. At least, not actual damages, like \$\$\$ per infringing copy. The breach of the terms (like not redistributing the source code) could be translated to some punitive damages, perhaps. Probably the best outcomes you can hope for are: the violator of the license is either asked to stop distributing the software, or else to come into compliance: replace the GPL'ed part with a from-scratch workalike, so that the program is no longer distributed with any GPLed code, or else make the whole program GPLed.



#### ▼ Re:What if it were Microsoft code (3, Insightful)

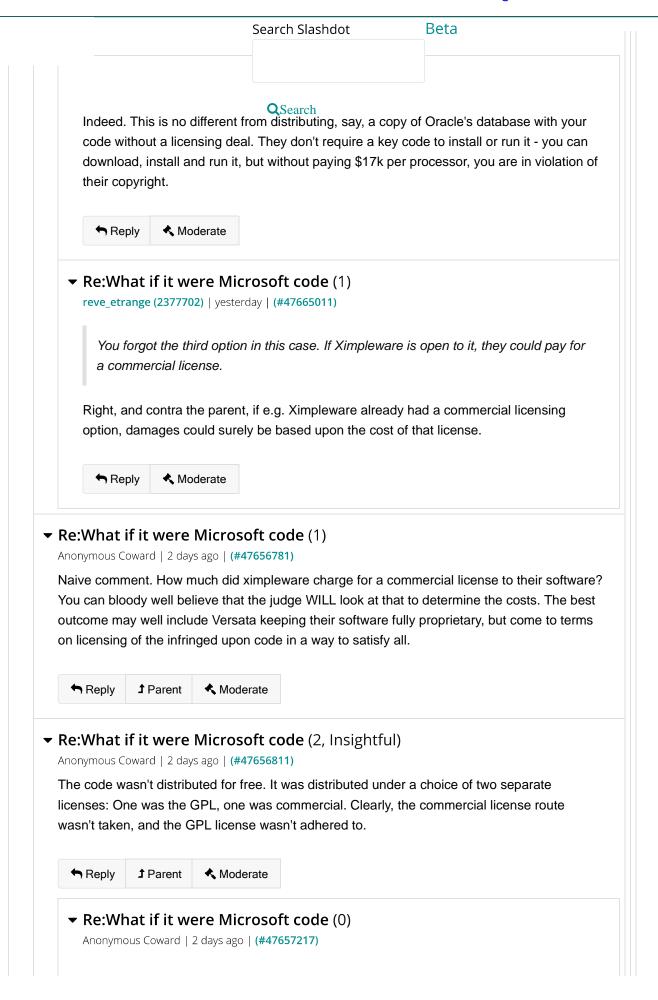
bulled (956533) | 2 days ago | (#47656727)

The difference is that the code is distributed for free. No judge is going to award damages for the redistribution of something that is free. At least, not actual damages, like \$\$\$ per infringing copy. The breach of the terms (like not redistributing the source code) could be translated to some punitive damages, perhaps.

I don't see how the lack of a monetary cost for \_one\_ of the licensing options should affect awarding damages.

Probably the best outcomes you can hope for are: the violator of the license is either asked to stop distributing the software, or else to come into compliance: replace the GPL'ed part with a from-scratch workalike, so that the program is no longer distributed with any GPLed code, or else make the whole program GPLed.

You forgot the third option in this case. If Ximpleware is open to it, they could pay for a commercial license.



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Irrelevant if the patent owners argument is accepted that the GPL license **did not include a license to use the software** because you also needed to obtain a license for the patent that the GPL'd source uses. It's like cops putting out a plate of free 'special' (unmarked as such) brownies next to a plate of \$5-per regular brownies at back-to-school night and promptly arresting everybody who eats one of the 'free' brownies.

If Oracle pulled such a BS claim out in their Java lawsuits, everybody but the corporate lawyers would be puking in disgust at such a bold admission of intent to entrap users.



▼ Re:What if it were Microsoft code (3, Informative)

dnavid (2842431) | 2 days ago | (#47657781)

The code wasn't distributed for free. It was distributed under a choice of two separate licenses: One was the GPL, one was commercial. Clearly, the commercial license route wasn't taken, and the GPL license wasn't adhered to.

Irrelevant if the patent owners argument is accepted that the GPL license did not include a license to use the software because you also needed to obtain a license for the patent that the GPL'd source uses. It's like cops putting out a plate of free 'special' (unmarked as such) brownies next to a plate of \$5-per regular brownies at back-to-school night and promptly arresting everybody who eats one of the 'free' brownies.

If Oracle pulled such a BS claim out in their Java lawsuits, everybody but the corporate lawyers would be puking in disgust at such a bold admission of intent to entrap users.

I believe Larry Rosen's warning to learn the facts carefully applies here. XimpleHelp's argument is not that the GPL license did not include a license to use the software. The problem is more complicated than that. XimpleHelp's argument, as I understand it, is that the software was offered under two terms: one: you could abide by the GPL and use it (and redistributed it under certain conditions) for free. Two: you could buy a commercial license and use (and presumably redistribute) the software without any need to follow the GPL. The VDT-XML distribution site is pretty clear on this: it took me only a couple minutes to find and read the relevant part of the FAQ:

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VTD-XML is protected by US patents 7133857, 7260652, and 7761459, as long as you abide by GPL, you don't have to worry about patent infringement. All licenses to any parties in litigation with XimpleWare have been expressly terminated. No new license, and no renewal of any revoked license, is granted to those parties as a result of re-downloading software from this or any other website If you don't like the restriction of GPL, XimpleWare also offers flexible commercial licenses for VTD-XML. Please email us at sales@ximpleware.com for more details.

XimpleHelp's legal argument as I understand it is that Versata violated the GPL when it used VDT-XML and \*redistributed\* the software in modified form without subjecting the derivative software to the terms of the GPL. That means effectively Versata did not have a valid license to VDT-XML, because they broke the GPL which granted it in the first place. Without that license, Versata was now not just in violation of the GPL, but also now violating XimpleWare's patent rights of the software - because Versata was using patent-protected software without permission.

Versata's customers may not have the right to estoppel they think they do, for the reason Rosen specifies: the GPL \*would have\* offered some protection to those customers if Versata itself had been compliant with the GPL. But since they are not, the GPL doesn't apply to Versata and neither does it apply to its customers - except insofar as they are in breach of it.

Addressing your analogy, nothing prevents Versata's customers themselves from downloading VDT-XML (or would have, before Versata terminated their ability to get a license because of the lawsuits) and using it, and nothing prevents anyone else from downloading VDT-XML and using it free from patent infringement allegations. If XimpleHelp tried to sue me for violating its patents just because I downloaded and used VDT-XML, they'd almost certainly lose that case both on legal merits and also because they explicitly said on their distribution site they would not do that (see the quote above). In that case, the estoppel rights Versata's customers are attempting to assert would apply to me, because I could reasonably argue what they are trying to argue and what you are suggesting: that XimpleHelp implicitly granted a license to use the software when they made it available under the GPL, which I am obeying. The problem is that XimpleHelp is asserting Versata is not obeying the GPL, and thus cannot assert an implicit license. Because of that, neither can Versata's customers.

Reply 1 Parent Moderate

## Search Slashdot Beta **Q**Search GPL when it used VDT-XML and \*redistributed\* the software in modified form without subjecting the derivative software to the terms of the GPL. That means effectively Versata did not have a valid license to VDT-XML, because they broke the GPL which granted it in the first place. Without that license, Versata was now not just in violation of the GPL, but also now violating XimpleWare's patent rights of the software - because Versata was using patent-protected software without permission. XimpleHelp's legal argument is wacky. Either Versata agreed to abide by the GPL (in which case they're liable to damages to XimpleHelp for violating the contract but are not liable for copyright or patent infringement since they had a valid contract for them) or they did not agree to abide by the GPL (in which case they're liable for damages due to copyright and patent infringement but not liable for any breach of contract). It's one or the other, not a mix and match free-for-all from both. In the former case, XimpleHelp expected to receive Vyatta's source code as compensation and is entitled to it. In the latter case, XimpleHelp expected to be paid at their normal rates for Vyatta's use of their source code and is entitled to payment. In both cases XimpleHelp is entitled to injunctive relief, preventing further sales of Vyatta's product until terms are met. Either way, going after the customers is a risky play. It seems plausible (or at least murky) that Vyatta's customers could gain access to the IP rights simply by downloading the GPL XimpleHelp software. If they can, naming them in a then-dismissable suit potentially creates a tortious interference claim turning XimpleHelp into a bad actor. **♪** Parent Moderate ▼ Re:What if it were Microsoft code (1) Immerman (2627577) | 2 days ago | (#47659033) I haven't read the GPL recently, but I suspect patent rights are limited to the software being licensed - so in your scenario the customers would have patent rights to use the GPLed copy of XimpleHelp, but still NOT have any patent rights with respect to the infringing software from Vyatta, for which they \*only\* have a license from Vyatta. Moderate

23 of 66 8/14/2014 4:51 PM

▼ Re:What if it were Microsoft code (1)

Reply

Reply

And:

And:

♠ Reply

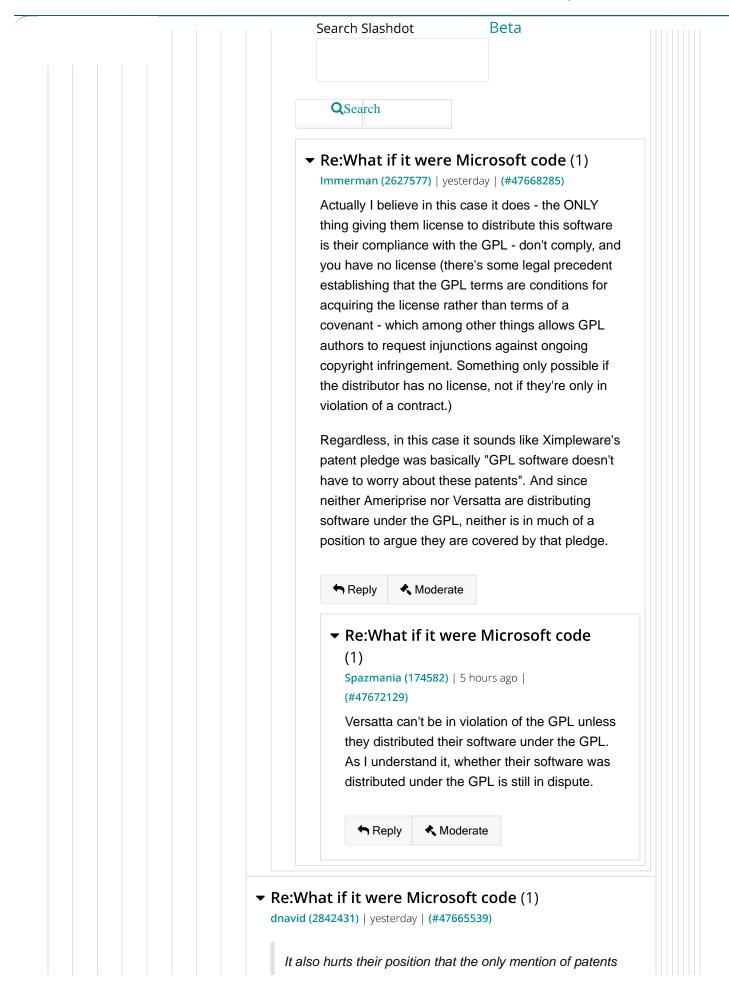
# Search Slashdot Beta **Q**Search then as a consequence you may not distribute the Program at all. For example, if a patent license would not permit royalty-free redistribution of the Program by all those who receive copies directly or indirectly through you, then the only way you could satisfy both it and this License would be to refrain entirely from distribution of the Program." "You may modify your copy or copies of the Program or any portion of it, thus forming a work based on the Program, and copy and distribute such modifications or work" "You may not impose any further restrictions on the recipients' exercise of the rights granted herein." So it would seem to me that an argument can be made that if patent restrictions by Ximpleware prevent you from using derivative works of VTD-XML then Ximpleware may not be distributed under the GPL. Since Ximpleware DID distribute it under the GPL, he either intended folks receiving a derivative work to have a license to the patent or he breached the GPL up front. It also hurts their position that the only mention of patents on VTD-XML's GPL web site (http://vtd-xml.sourceforge.net/) is: "Although VTD-XML is protected by US patents 7133857, 7260652, and 7761459, as long as you abide by GPL, you don't have to worry about patent infringement." Moderate Immerman (2627577) | yesterday | (#47663799) However, If XimpleWare granted a patent license or

▼ Re:What if it were Microsoft code (1)

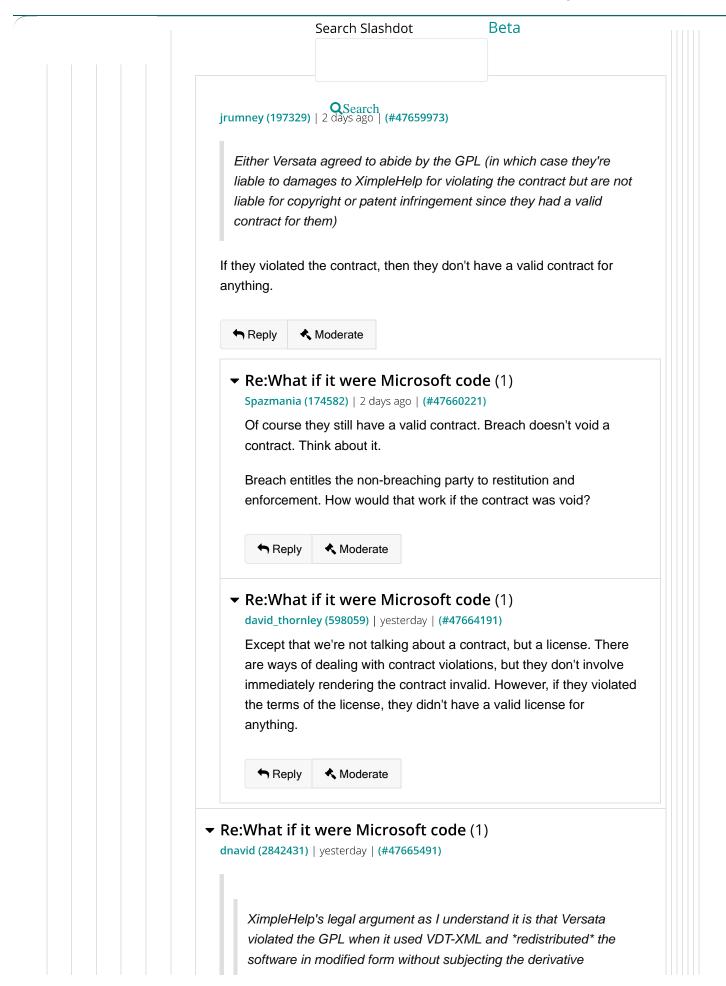
non-enforcment covenant to derivative GPL works (as I believe is the claim) the issue becomes moot - anyone using the code under the GPL license gets a patent license automatically - so no additional restrictions are imposed. However, as soon as the GPL is violated the patent license is likewise null and void, so that you are infringing both the copyrights and patents on the software(at least that's how I'd

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separately. with it - the software or oretty self-c to hold the oroject. Not	license only specifice you have it. I defeating to release threat of patent to mention putt	re, they can do what ecifies what YOU of Course it would ase their code und litigation over any ting them in legal helse's GPLed code	ean do with that probably be er the GPL only downstream not water if they
anyone with here is that hus can't e don't have s ndepender Ameriprise /ersatta to hey will su- nave no cla	n a valid GPL lice. Versatta doesnow tend it to their sufficient rights to the principle of the customer, the customer, try to get those ceed). And without versatts a valid of the customer.	eve granted a pater sense, it's a non-iss of the avea valid GP customers. And the to Versatta's software themselves curights, though it's fout a license under cense either. Or so	sue. The problem I'L license, and eir customers are to be able to nce with the GPL rrently suing far from clear that r the GPL they
think Ximple continuing to customers, GPL by doi the circums booth legal a	eware were just to further redistruces despite knowing and so (they're the stances I think X and moral, to de	end-user I would be being dicks, but A ibute the software g that they are in vote ones who broug impleware is well womand that Amerprieir patents without	meriprise is to it's OWN iolation of the ht it up). Under within it's right's, se stop selling a
Reply	<b>♣</b> Moderate		

That's an error. Violated != void. Violated means the license remains in full force and effect and you're entitled to enforcement of its terms. But it remains in full force and effect, including all the rights granted to the violator!



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O Seconds
QSearch
In what legal way does this hurt XimpleHelp? Patent holders
are not required to announce that fact anywhere under the law,
the only difference would be the issue between knowing and
unknowing infringement (an issue of damages, not of
culpability).
Versata is arguing bait and switch: that XimpleHelp allowed
people to download the software "freely" and then now wants
to spring a patent infringement trap on them. But that legal
argument is completely invalid to me, because XimpleHelp did  *not* allow people to download the software "freely." They
allowed them to download and use the software sunder the
terms of the GPL. People who do not follow the GPL should
not presume that they have any right to the software, and at
that point without a valid license all sorts of penalties can
accrue to people who in effect steal something, up to and including the fact they may have infringed on other rights
besides the GPL itself.
Its not a legal defense to argue "if I had known the software had patent protection, I wouldn't have stolen it."
naa paloni protestion, i waalan mara atalan ili
➡ Reply
///opiy timedelde
▼ Re:What if it were Microsoft code (1)
<b>Spazmania (174582)</b>   yesterday   <b>(#47665767)</b>
Patent holders are not required to announce that fact
anywhere under the law
35 U.S. Code  287 (A) reads in part: "In the event of
failure so to mark, no damages shall be recovered by the
patentee in any action for infringement"
So technically you're right, it's a question of damages not
culpability. But practically speaking I was right too: failure to adequately mark the patented product hurts
Ximpleware's case. In the worst case, Versatta could
argue that error in conjunction with Ximpleware's other
behavior shows bad faith. That could get really ugly.



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#### **Q**Search

Versata was using patent-protected software without permission.

XimpleHelp's legal argument is wacky. Either Versata agreed to abide by the GPL (in which case they're liable to damages to XimpleHelp for violating the contract but are not liable for copyright or patent infringement since they had a valid contract for them) or they did not agree to abide by the GPL (in which case they're liable for damages due to copyright and patent infringement but not liable for any breach of contract). It's one or the other, not a mix and match free-for-all from both.

I have no idea what you mean specifically by "mix and match free-for-all" but in the general case it is very common in legal arguments to argue that the facts support only one of a small set of possibilities, and the law entitles you to relief under all of them. That's a trivial method of logic that is perfectly acceptable in the law.

Either way, going after the customers is a risky play. It seems plausible (or at least murky) that Vyatta's customers could gain access to the IP rights simply by downloading the GPL XimpleHelp software. If they can, naming them in a then-dismissable suit potentially creates a tortious interference claim turning XimpleHelp into a bad actor.

Under the terms of the GPL, they could have up until the point where XimpleHelp denied them that relief by explicitly revoking that right. But even if that revocation is deemed invalid, there's the separate matter that downloading the software themselves is not enough to supply Versata's customers with GPL protection: the GPL would only allow them to use the base software itself, not the derivative work Versata created. To comply with the GPL, Versata would have to supply its customers with its base source code and allow its customers to patch in Versata's VDT-XML extensions themselves, which is allowed under the GPL. Under the GPL, you can download and modify GPL software for your own use, but you cannot redistribute that software. If Versata's customers could immunize themselves by simply downloading VDT-XML, that would make the GPL's protections effectively meaningless. Courts tend to be reluctant to interpret contracts and license agreements in a way that renders their literal text meaningless. I find it highly unlikely any reasonable court would rule the GPL's terms could be circumvented in this manner.

Search Slashdot Beta **Q**Search You're conflating three distinct issues here: unlawful posession of a copyrighted work, unlawful copying and distribution of a copyrighted work and unlawful use of a patent. Downloading the original GPLed work places Versata's customers in a position where they're entitled to posession of the derivative work. The path gets arcane but that's the bottom line. Versata's customers are not entitled under the GPL to further distribute the derivative work without versata's source code. Period. They're liable for any such distribution, witting or otherwise, and Versata is liable to them for any damages they suffer as a result. There's a decent case to be made that separately acquiring the software in a manner compliant with the GPL entitles the recipient to a license to use the Versata patents. Versata's behavior allows the statements they made about patent use in the GPL software to be interpreted that way. It puts the patent claim uncomfortably close to the 50% preponderance of the evidence line. Reply Moderate ▼ Re:What if it were Microsoft code (1) dnavid (2842431) | yesterday | (#47666765) You're conflating three distinct issues here: unlawful posession of a copyrighted work, unlawful copying and distribution of a copyrighted work and unlawful use of a patent. Downloading the original GPLed work places Versata's customers in a position where they're entitled to posession of the derivative work. The path gets arcane but that's the bottom line. I don't believe your interpretation of the law here is correct. Downloading the original GPLed work does not automatically grant a license to possess derivative works. There is case law here involving the legal status of "collages" and other such

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derivative work. License to a piece does not automatically grant rights to the whole, and the whole has a separate legal status from the status of the components. Once VTD-XML was

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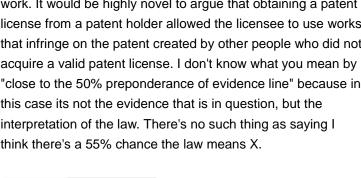
#### **Q**Search

repair the fact the work is unlicensed, and therefore Versata's customers are not entitled to possess it.

Versata's customers are not entitled under the GPL to further distribute the derivative work without versata's source code. Period. They're liable for any such distribution, witting or otherwise, and Versata is liable to them for any damages they suffer as a result.

There's a decent case to be made that separately acquiring the software in a manner compliant with the GPL entitles the recipient to a license to use the Versata patents. Versata's behavior allows the statements they made about patent use in the GPL software to be interpreted that way. It puts the patent claim uncomfortably close to the 50% preponderance of the evidence line.

Patent licenses are not universal. By downloading VTD-XML someone gets a license to use XimpleHelp's patents, but only within the context of using VTD-XML itself. It does not grant them the universal right to use those patents in any way they see fit, including using them within an otherwise infringing work. It would be highly novel to argue that obtaining a patent license from a patent holder allowed the licensee to use works that infringe on the patent created by other people who did not acquire a valid patent license. I don't know what you mean by "close to the 50% preponderance of evidence line" because in this case its not the evidence that is in question, but the interpretation of the law. There's no such thing as saying I think there's a 55% chance the law means X.



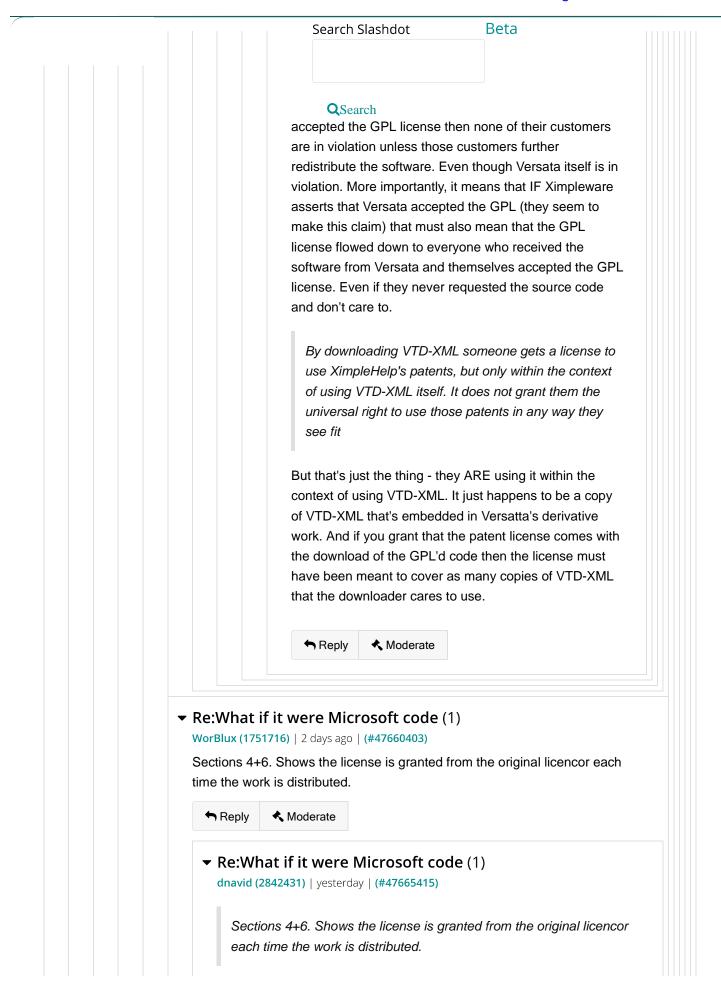
Reply Moderate

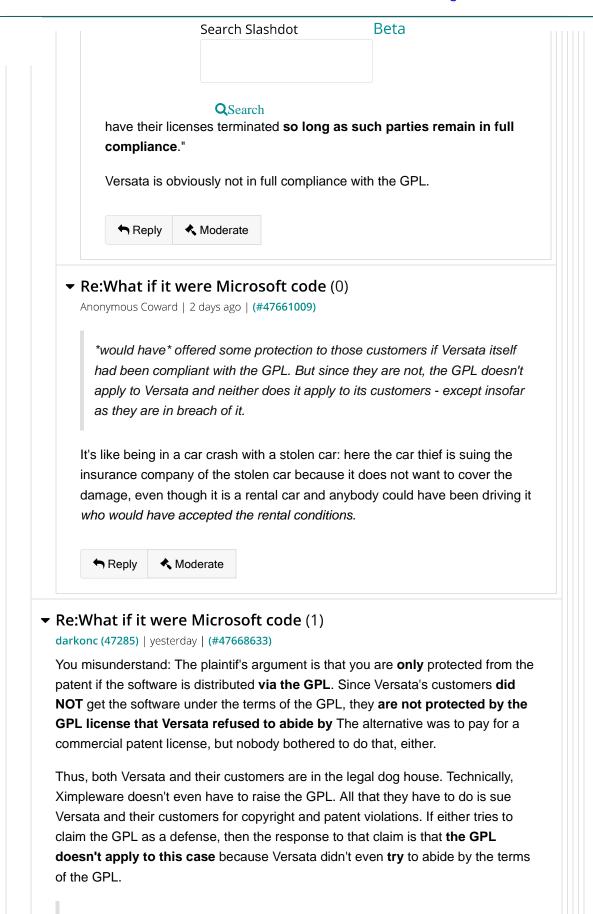
## ▼ Re:What if it were Microsoft code (1)

Spazmania (174582) | yesterday | (#47668257)

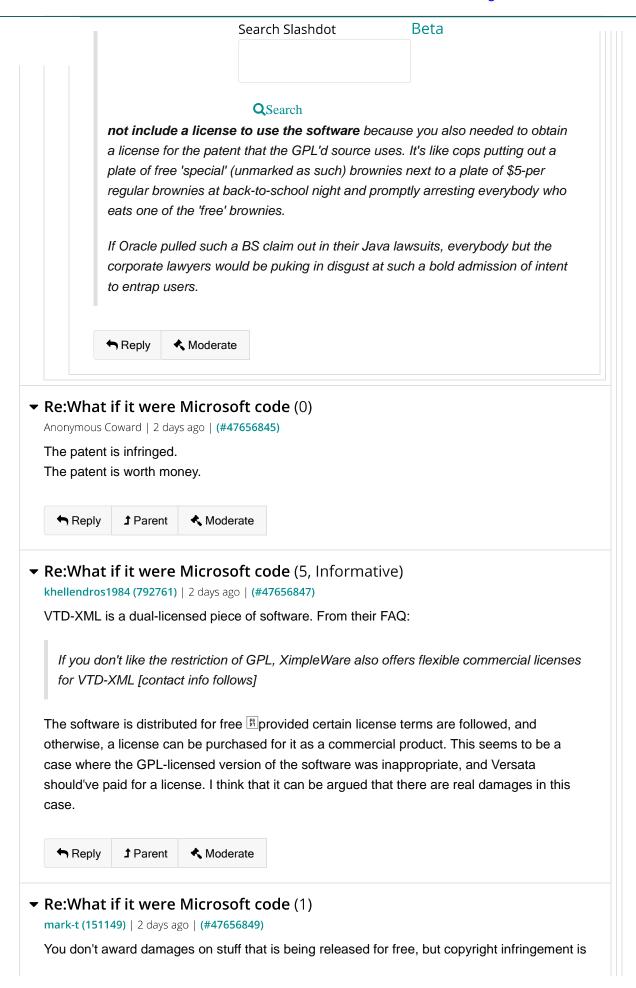
Downloading the original GPLed work does not automatically grant a license to possess derivative works.

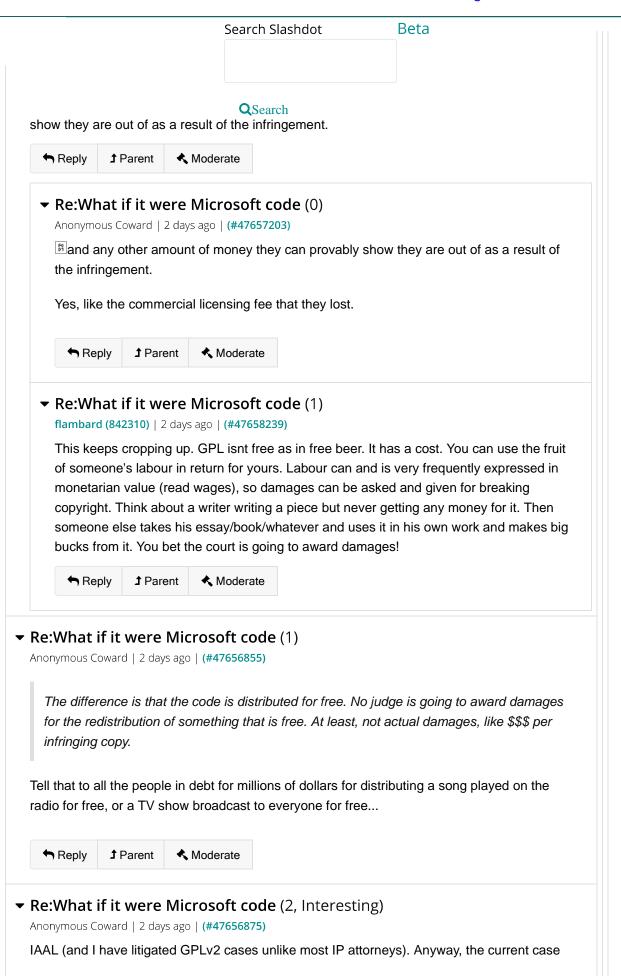
A decent argument can be made, but you can come at





The code wasn't distributed for free. It was distributed under a choice of two





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prove.	<b>Q</b> Search		
♣ Reply 1 Parent ♣ Mo	oderate		
▼ Re:What if it were Micro Kjella (173770)   2 days ago   (#47			

The difference is that the code is distributed for free. No judge is going to award damages for the redistribution of something that is free.

If you sue under US law there's statutory damages, the kind that lets the RIAA/MPAA charge a \$750 minimum (that can go down to \$200 if you're an innocent infringer) and \$150,000 maximum per work. Make that \$250,000 and up to 5 years in prison if you can show it was for profit, which shouldn't be a problem in this case. If they can hire a lawyer to get a \$10,000/song verdict for a 99 cent product, surely you can make up some imaginary numbers of lost commercial licenses too. However that's got nothing to do with the customers of the infringing party as they didn't violate copyright. That part is about patents, basically as a result of taking this GPLv2 code but not getting a patent license, they're in violation of patents. Just like I can download and use x264 but still infringe on the H.264 patents.

The catch here though is that they're trying for an estoppel defense, because XimpleWare is the one with both the code and the patents. That may or may not work as the GPLv2 still means you can distribute it freely except in countries where it's patented - like the US - and if you bring it to the US and use it there then you're on the hook for patent infringement. I don't see the very big principal implications though.

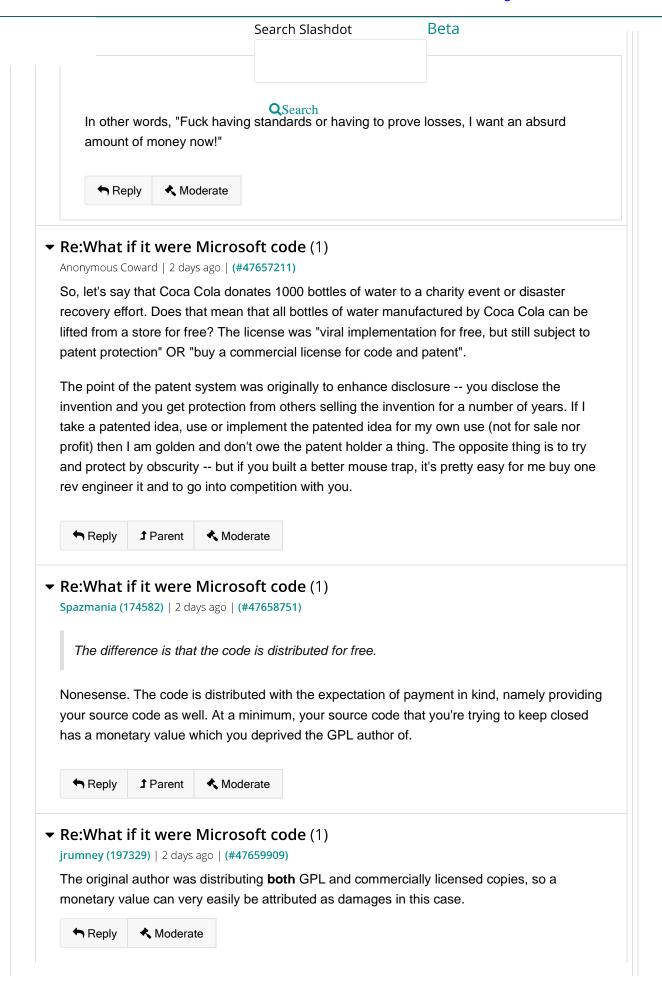


#### **▼ Re:What if it were Microsoft code** (4, Informative)

sribe (304414) | 2 days ago | (#47657039)

The difference is that the code is distributed for free. No judge is going to award damages for the redistribution of something that is free. At least, not actual damages, like \$\$\$ per infringing copy. The breach of the terms (like not redistributing the source code) could be translated to some punitive damages, perhaps.

Copyright law explicitly provides for statutory damages of up to \$250,000 per copy, precisely so that authors who are ripped off do not have to definitely prove exactly how much they lost.



moneta humani Re What if it Anonymous C	were Mico	crosoft code s ago   (#476566 vouldn't blame	e (0)	NO different with GPI	
moneta humani Re What if it Anonymous C	were Mico	crosoft code s ago   (#476566 vouldn't blame	e them. It's absolutely		
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being a	ry. The GPL	exist to fight r	money based extortio	GPL states other demns. The damages are	damages against
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Free so					

## ▼ Would a commercial vendor forgive an ordinary user (0)

Anonymous Coward | 2 days ago | (#47656585)

Should we forgive commercial companies who fail to undertake honest compliance with the GPL? Should we forgive their customers who aren't diligent in acquiring their software from diligent

•	derstanding (and Enf 5:13-cv-05161-F	<i>C</i> <sup>7</sup>	http://beta.slas ed 11/10/14 Page 39 of 66	shdot.or
		Search Slashdot	Beta	
Reply	Moderate	<b>Q</b> Search		
ShanghaiBill (	d to freely licens 739463)   2 days ago   6 uld be compelled to		s a result.	
and being "c	ompelled to freely li	g copyright law. Copyright law specense" a product is NOT one of the	Ils out specific remedies for violation ose remedies.	าร,
◆ Reply	Moderate mpelled to freel	y license? (1)		
	artian (840721)   2 day			
The cop	yright part of the GF	PLv2 doesn't allow that remedy, but	it the GPL isn't just a statement of	

copyright, but is also a license, and the license part of the GPLv2, which you agree to if you use GPL code, does specify what must happen if GPLv2 code is incorporated.

And if software companies are suddenly saying licenses aren't enforceable, then wow, we've entered a brand new age.



#### ▼ Re:Compelled to freely license? (1)

vux984 (928602) | 2 days ago | (#47656919)

The copyright part of the GPLv2 doesn't allow that remedy, but the GPL isn't just a statement of copyright, but is also a license, and the license part of the GPLv2, which you agree to if you use GPL code, does specify what must happen if GPLv2 code is incorporated.

So if they used a non-gpl library from microsoft in their code, or paid for a 3rd party license what then? The court is going to force them to GPL and distribute those as well? That's just asinine. It would NEVER happen. It doesn't even make sense that a court would ever order that.

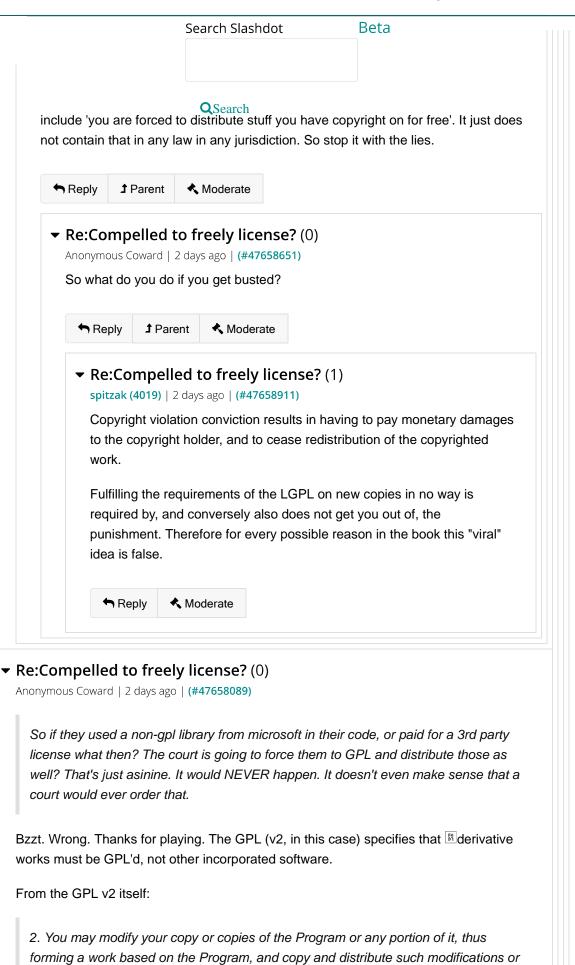
If you are in violation of the GPL then you lose the right to distribute the code. That's it. For copies of the program you already distributed you will be on the hook for damages. That's it.

And if software companies are suddenly saying licenses aren't enforceable, then wow, we've entered a brand new age.

The license doesn't specify that you must release the code as a REMEDY for violation of the

8/14/2014 4:51 PM 39 of 66

## Search Slashdot Beta **Q**Search ▼ Re:Compelled to freely license? (0) Anonymous Coward | 2 days ago | (#47657083) This is why the LGPL was created. Any utility library licensed using the GPL should never be touched by commercial vendors unless they understand the difference. This was a smart move on Ximpleware's part, as it does have the impact of essentially "infecting" Versata's entire codebase unless they are granted a commercial license (the hammer to the commercial license carrot). The GPL does state that if you cannot meet the terms of the license by distributing the source code for the entire program (DLLs and all) then you aren't allowed to distribute it. **力** Parent Reply Moderate ▼ Re:Compelled to freely license? (1) vux984 (928602) | 2 days ago | (#47657769) The GPL does state that if you cannot meet the terms of the license by distributing the source code for the entire program (DLLs and all) then you aren't allowed to distribute it. The GPL at that point is just re-stating copyright law. This was a smart move on Ximpleware's part, as it does have the impact of essentially "infecting" Versata's entire codebase unless they are granted a commercial license (the hammer to the commercial license carrot). The word 'infect' is simply inaccurate FUD. Suppose a guy with a serious virus gets on a plane and infects the rest of the passengers. THAT is an infection. They can't solve the problem by simply removing the original carrier. The GPL library doesn't 'infect' anything, they can simply remove the dependency. Problem for the rest of the code solved. They are still on the hook for copyright infringement/license violation for any copies they distributed up to that point, but the 'code' itself isn't infected in any meaningful way. **♪** Parent A Reply Moderate ▼ Re:Compelled to freely license? (1) spitzak (4019) | 2 days ago | (#47658243) No, it has NOTHING to do with "infection". That is a FALSE concept, a LIE perpetuated by MicroSoft to discredit the GPL. There IS NO SUCH THING AS



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parties under the terms of this License. c) If the modified program normally reads commands interactively when run, you must cause it, when started running for such interactive use in the most ordinary way, to print or display an announcement including an appropriate copyright notice and a notice that there is no warranty (or else, saying that you provide a warranty) and that users may redistribute the program under these conditions, and telling the user how to view a copy of this License. (Exception: if the Program itself is interactive but does not normally print such an announcement, your work based on the Program is not required to print an announcement.) These requirements apply to the modified work as a whole. If identifiable sections of that work are not derived from the Program, and can be reasonably considered independent and separate works in themselves, then this License, and its terms, do not apply to those sections when you distribute them as separate works. But when you distribute the same sections as part of a whole which is a work based on the Program, the distribution of the whole must be on the terms of this License, whose permissions for other licensees extend to the entire whole, and thus to each and every part regardless of who wrote it. [emphasis added]

Posting AC as I've moderated on this thread.



## ▼ Re:Compelled to freely license? (1)

**ShanghaiBill (739463)** | 2 days ago | **(#47656963)** 

... which you agree to if you use GPL code ...

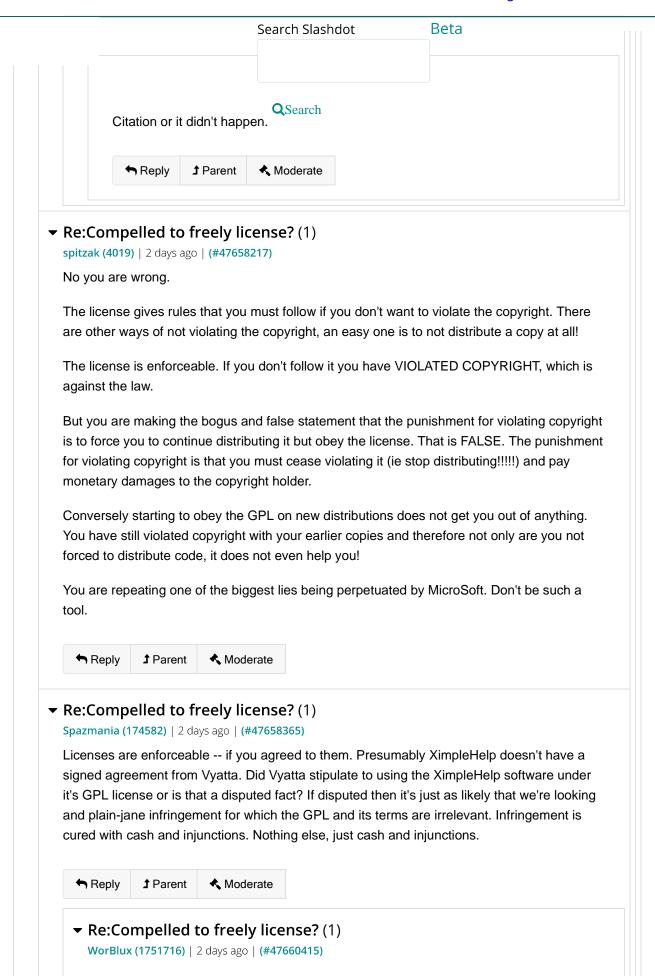
No. You only agree if you agree, by say, signing an agreement. If you use GPL in violation of the license, and you have never agreed to that license, then you are in violation of copyright law, not contract law.

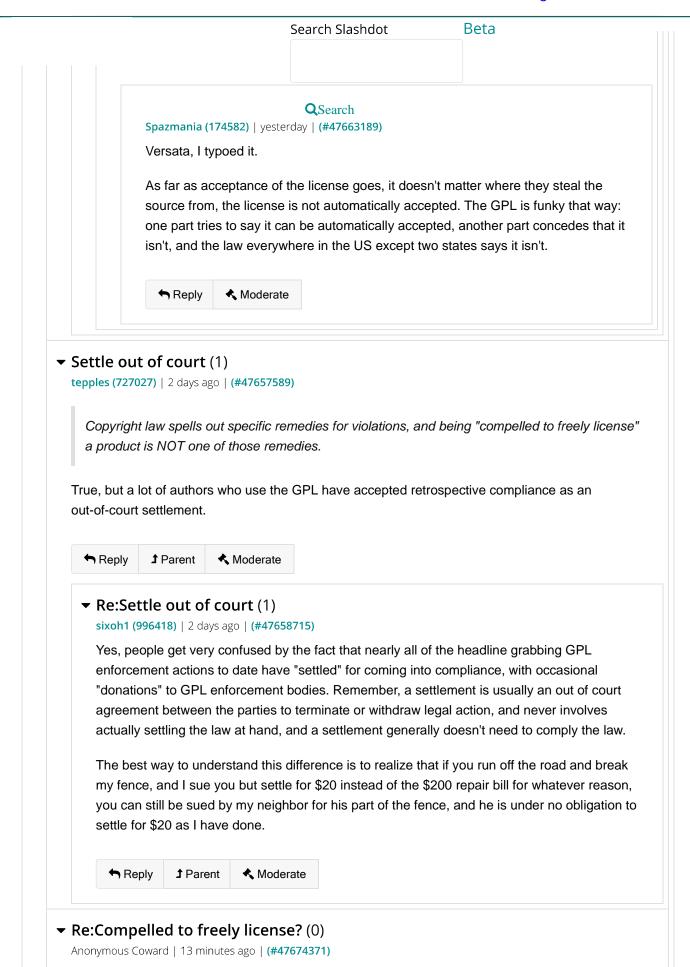


### ▼ Re:Compelled to freely license? (1)

MightyMartian (840721) | 2 days ago | (#47657841)

Thanks to the Supreme Court of the United States, one does not have to physically sign any agreement to be bound by it. Use alone, such as putting a commercially-produced DVD in a DVD player, is sufficient for you to have agreed to the terms.





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decided that the attempt to prevent the of copyright over the item the contract professional was of the opinion that the contract in the contract of the opinion that the opini	t was attempting to protect. He ne remedies spelled out in cop	ence, at least one legal
remedies applicable to cases that inv	olve this law.	
Reply Moderate		

#### **▼** Fault appears to lie with Versata (2)

BaronM (122102) | 2 days ago | (#47656659)

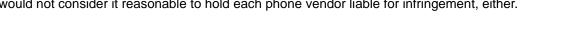
If I read correctly:

Reply

- 1. Versata produced software 'DCM' incorporating Ximpleware's GPLv2 licensed code.
- 2. Versata licensed DCM to Ameriprise, who then distributed copies to it's independent contractors.
- 3. Ximpleware's code is subject to patent claims in the USA, making distribution under GPLv2 impermissible, and Versata did not have a commercial license, making Versata's distribution of Ximpleware's code unlicensed (in the USA).
- 4. Ameriprise was not aware of (1) or (2) until discovery related to a lawsuit between Versata and Ameriprise.

If this is correct, I can see where Ximpleware has a copyright claim against Versata, but I don't see where Ximpleware has a copyright claim against Ameriprise for any distribution of DCM to it's contractors. Strictly speaking, I suppose Ameriprise did distribute copies of Ximpleware's code, but if they did so under good-faith belief that they had appropriately licensed DCM from Versata, I can not see it being reasonable to hold Ameriprise liable.

At the risk of a possible bad analogy, if Google included undocumented unlicensed code in Android, I would not consider it reasonable to hold each phone vendor liable for infringement, either.



## **▼** But Ameriprise is vulnerable to patent claims (2)

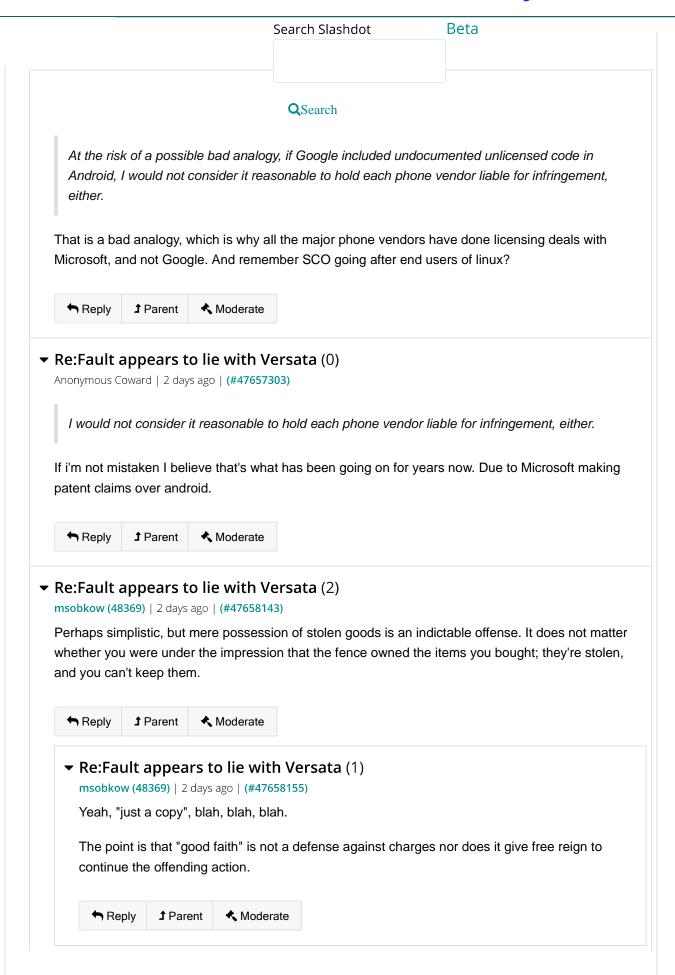
sirwired (27582) | 2 days ago | (#47656735)

Moderate

"Good Faith" helps reduce your damages in a patent claim, but mere use of patented software (much less distribution) leaves you open to patent claims, independent of copyright claims.

And yes, this is a problem with software patents. Both the distributor and end users are vulnerable to claims.

Android is indeed tied up in all sorts of patents, and every phone vendor has to pay up licensing fees, including to Microsoft. (As of a couple years ago, MS made about 10x their Windows Phone revenue just from Android lic fees.)



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#### **Q**Search

distribution or copying not compliant with the GPLv2 would violate not only copyright but patents.

Ameriprise did distribute copies of XimpleWare's code without proper license. If they'd merely used copies they got from Versata, they'd be in a much better position. If the contract with Versata contained an indemnification clause, then Versata would be responsible for at least part of any findings against Ameriprise. That's what indemnification clauses are for. They're not automatic. Ameriprise has a very good argument that it did not violate patents or copyrights willfully or knowingly, but they still violated.

The idea behind the law is to give the copyright and patent holders control over their work, and not allow a company to use it with impunity by having the copies go through a disposable company first.



## ▼ The viral argument is misleading. (2)

queazocotal (915608) | 2 days ago | (#47656695)

You distribute compiled code with GPL integrated, without complying with the GPL.

If this is discovered, then your customer has no right at all under the GPL to your whole code, and the GPL can never give them any rights.

The only way you can come into compliance with the GPL is to distribute sources for the whole blobbut in practice what has to happen to compel you to do this is for you to either decide that it is easier doing this than going to court - or for an author of the GPL code (or for the FSF where authorship has been assigned) to take court action for violating the licence - and then for the court to as the penalty require the release of source code.

The court is much more likely to go for financial damages - as that's what they know.

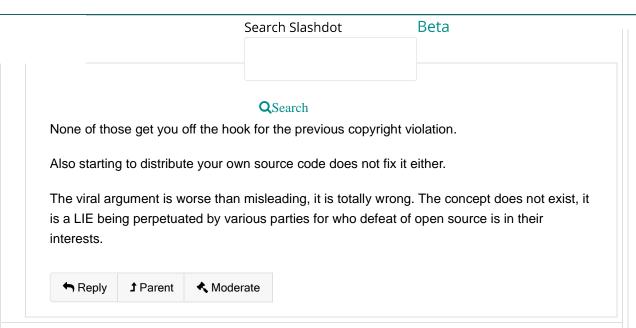


## ▼ Re:The viral argument is misleading. (0)

Anonymous Coward | 2 days ago | (#47656827)

you could also:

- 1) Eliminate the GPL code, either by replacing it with a proprietary version, or rolling your own.
- 2) Negotiate with the copyright holder for a proprietary release of the same code (only works well if there aren't a lot of separate copyright holders, and if the actual holder isn't an idealistic nut).
- 3) Stop distributing the product (only works well if you can stop distributing the specific feature/module that uses GPL code and the client doesn't need it, or if you have an alternative product that gets equivalent work done).



#### ▼ Re:The viral argument is misleading. (1)

**Spazmania (174582)** | 2 days ago | **(#47658445)** 

That depends. If your customer can prove that you accepted the GPL license for the code you later integrated into your product then that license flowed to them with the copy of the binary and they have the right to demand production of your source code for the relevant binaries. Proof such as an email chain discussing the GPL where you explicitly acknowledge that you acquired the code under that license. Which the customer gains access to through discovery.

If the customer can't prove you ever agreed to the GPL then it's plain infringement. In which case you're forced to discontinue use of the unlawful software and may claim damages for the monetary harm that does you.



#### ▼ Re:The viral argument is misleading. (1)

david\_thornley (598059) | yesterday | (#47664345)

Actually, no, you can't come into compliance with GPLv2 by retroactively following it. If you've violated it, you no longer have a license (GPLv3 has provisions for coming into compliance again, but GPLv2 doesn't).

You can either accept the injunction from further distribution and pay what the court says to, or you can negotiate with the copyright holder(s). In many cases, the violator has negotiated a settlement in which they provided some guarantees that they would relicense the already distributed code, and do further distribution in accordance with the GPL, in addition to getting their GPL rights back. That would only happen as part of a settlement. As it happens, the FSF's attitude is that such a settlement is perfectly agreeable to them, and so if you're dealing with them you can almost certainly get such a settlement. No court is going to order such a thing in a case of copyright violation, and that's what a GPL violation is.

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Odds are high that the remedy will simply be to cease distribution and fix the problem. Perhaps some court costs and settlement money.

The odds the court would require them to release the source for everything under the GPL is almost laughably absurd.

For starters that would almost invariably trigger a bunch of OTHER license violations for other libraries and packages they used. No court is going to enforce the GPL by demanding the company violate all its other suppliers licenses. Its just ridiculous on its face.

Its just FUD and full on stupidity.



## ▼ Re:I hate articles like this (1)

jopsen (885607) | 2 days ago | (#47657689)

The odds the court would require them to release the source for everything under the GPL is almost laughably absurd.

Agree... But terms of the GPL says that if you violated it the license is revoked.

By my interpretation that means that once violated you don't have a license, and **complying with GPL terms after the fact has no effect**.

Thus, the case is reduced to somebody using software for which they don't have a license.

I'm pretty sure bringing yourself into compliance won't change the fact that the license was revoked. But most vendors **might** be willing to extend a new GPL license to you, if you comply with the terms - just as a way to end the case.



#### ▼ Re:I hate articles like this (1)

vux984 (928602) | 2 days ago | (#47657843)

By my interpretation that means that once violated you don't have a license, and complying with GPL terms after the fact has no effect.

It has no effect on the previous copyright infringement, but it does mean you can move forward with distribution.

I'm pretty sure bringing yourself into compliance won't change the fact that the license was

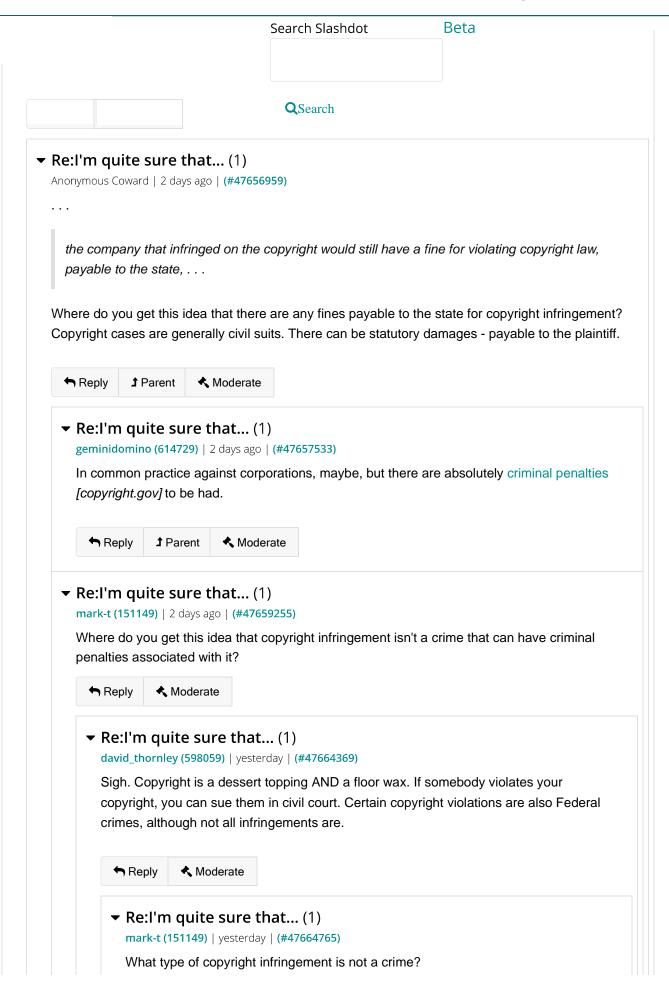
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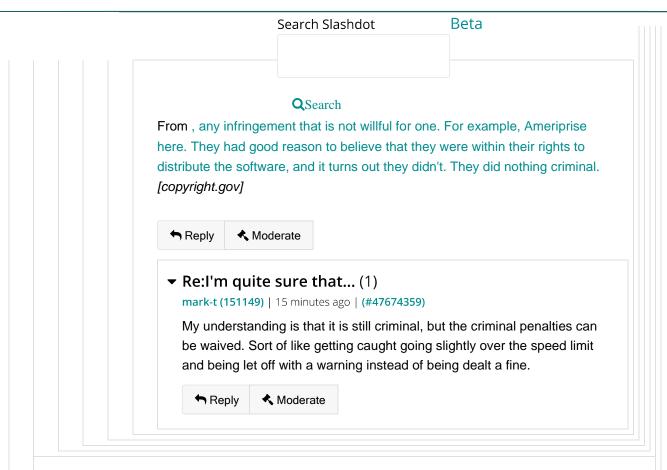
▼ I'm quite sure that... (3, Interesting)

mark-t (151149) | 2 days ago | (#47656813)

 $\dots$  the GPL cannot compel you to realease your own source code for free, no matter what you do.

It can, however, make you guilty of copyright infringement if you don't comply (since permission to copy the work does not exist if you don't agree to the terms of the GPL), and this can result in a legally sustainable C&D against the distribution of any and all products by the company which utilize the GPL code in a noncompliant fashion until either all of the GPL code is removed, the code is released, or else alternative licensing arrangements can be made. Exact damages awarded to the copyright holder, if any, would probably be at the discretion of the court, but even if there were none, the company that infringed





## **▼** Re:I'm quite sure that... (0)

Anonymous Coward | 2 days ago | (#47661027)

... the GPL cannot compel you to realease your own source code for free, no matter what you do.

It can, however, make you guilty of copyright infringement if you don't comply

No, it can't. Your copying without permission makes you guilty of copyright infringement. The only thing the GPL can do is make you *unguilty* of copyright infringement if you heed its conditions.

Saying the GPL "can make you guilty of copyright infringement" is disingenuous. If I tell my neighbor "you can take the apples from my orchard if I get a piece of the pie" and he then goes hollering around that I am trying to turn him into a thief since my permission makes him guilty of theft since he does not comply, that's a piece of bullshit and a crook's way of looking at things.



## ▼ Re:I'm quite sure that... (1)

mark-t (151149) | yesterday | (#47664017)

Fair point... you are right it's not the GPL itself that makes one guilty of copyright infringement, it's their own actions of copying the work without permission. The GPL only explicitly states that permission will not be given to copy the work if one does not agree to its terms, which is how it might feel like it's the GPL's terms that cause copyright infringement, but you are

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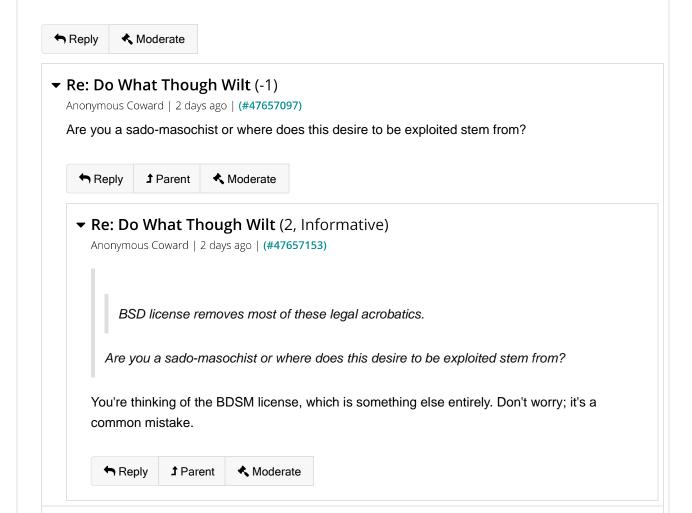
## ▼ Do What Though Wilt (2, Insightful)

Anonymous Coward | 2 days ago | (#47656977)

BSD license removes most of these legal acrobatics.

The GPL has behind it an altruistic notion. That is, that your code can be extended and improved and will still remain free. I've always been of the view that it is even more altruistic to let people do what they wish with my code, even if that means closing it off in proprietary products, not acknowledging my efforts, and making money off of it while not giving any back to me.

If a company does make money of of my code, then great, I hope they create lots of jobs and provide benefits, and generally improve whatever economy the reside in.



#### ▼ Re:Do What Though Wilt (0)

Anonymous Coward | 2 days ago | (#47657529)

They are just different. Your preference is fine -- so is mine.

> If a company does make money of of my code, then great, I hope they create lots of jobs and provide benefits, and generally improve whatever economy the reside in.

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its distribution under that license in the United States

Not entirely true. That section says that you cannot further distribute any GPL software that salso has patent encumbrances (or other encumbrance enacted by court order or similar judgement). It's not clear what original copyright and patent holder's options are. They could license the software under the GPL with a patent license attached that prevents further distribution (arguably perverting the point of the GPL). The question before the court is whether distribution of the software under the GPL by the original patent holder without an explicit patent agreement automatically grants a right to the patent as the license as the intent of the GPL is to enable further distribution.



#### ▼ Re:Misreading section 7? (1)

**Spazmania (174582)** | 2 days ago | **(#47658599)** 

Actually, section 7 of the GPL says "If you cannot distribute so as to satisfy simultaneously your obligations under this License and any other pertinent obligations, then as a consequence you may not distribute the Program at all."

So, if Ximpleware intentionally distributed the software under the GPLv2 (they did) and held the patents (they did) then either they must have intended that any recipient of the software under the GPLv2 also receive a license to use the patents or they deliberately breached the GPL contract with every single person who downloaded the code making them (Ximpleware) liable for damages from any of those users who are otherwise compliant with the terms of the license.

Either way, the court might reasonably cure Ximpleware's problem by affirming the existence of a patent license to everyone legitimately using the code under the GPL.



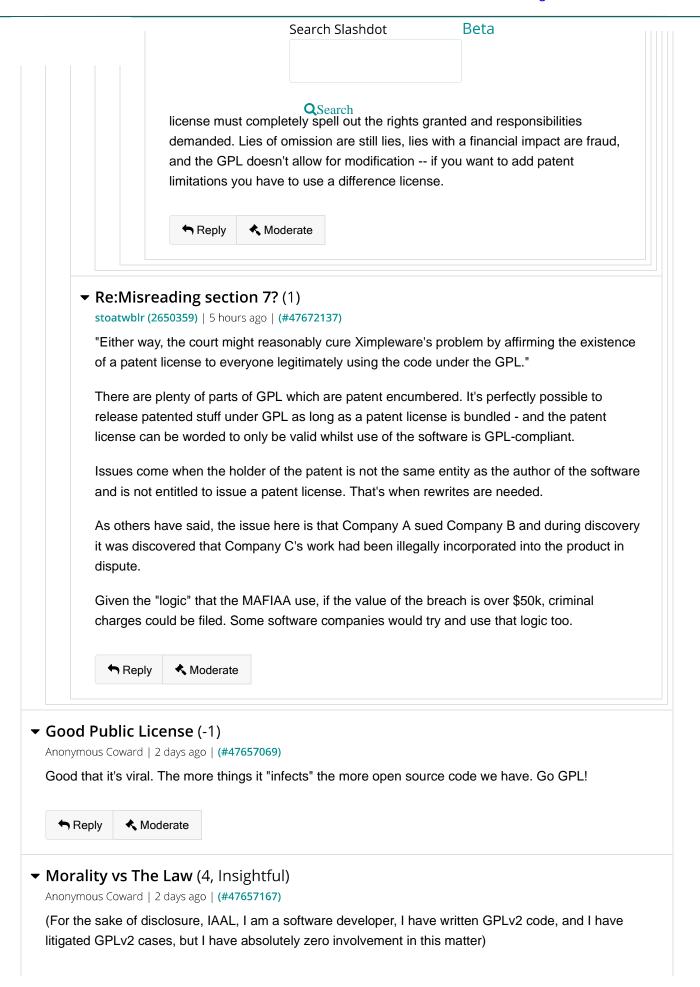
#### ▼ Re:Misreading section 7? (1)

j-beda (85386) | 2 days ago | (#47659923)

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		Spazmania (174582)	5 hours ago   <b>(#47672177</b> )	



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to lean towards money grab.

That said, having intimate knowledge of both sides of the equation here (opensource development ideas and IP attorney mentalities), I can attest that the ideals employed by both sides are, generally, diametrically opposed. Is Ximpleware is right, legally, in the fact that it can release a GPLv2'd software, file patents on the ideas, and then sue the living pants off everyone for patent violations? Frankly, yes because IP laws are harsh and designed to be massive swords. Still, the defendants have decent equitable arguments for estoppel under their implied license/baiting arguments which have precedent in the realm of copyrights. Outside the legalities, is it morally right as an opensource developer? No, probably not.

Suing the hell out of a violator? Go for it. Suing the hell out of a customer with knowledge of the infringement: Sure, why the hell not. But sending off lawsuits to unwitting customers who simply purchased a product they didn't know was infringing? Now you're pushing the line. Such actions have real world consequences. The litigation of these cases is extremely expensive, extremely time consuming, and a corporation must hire representation in U.S. courts (they cannot appear pro se). Most attorneys ignore those realities because, frankly, the suffering of a defendant is of no concern. The only thing that matters is whether the case is meritorious; if so, I'm suing the living pants off you because the law says I can. The motto is typically summarized as: legal, not ethical. But is that what the opensource world wants to present?

Mr. Rosen throws around "indemnification" and "diligent" arguments to justify the lampooning of what most people would consider "innocent" parties, but they're shill arguments at best. The simple truth, is that you're not furthering the opensource movement in any way. As for indemnification, it is a farce. First, it's speculative that any such agreement exists. Second, the indemnitor needs to: 1) agree to honor it's obligation; 2) have the resources to honor it's obligation; and 3) actually honor the obligations. The reality is that a request for indemnification is just as likely to result in more lawsuits, as it is to result in a resolution for the downstream users. Beyond that, if original defendant files for bankruptcy, indemnification is worth absolutely squat. As for "due diligence," any software engineer will readily admit, it is nearly impossible (especially for small to mid-sized firms that are letting non-technical staff handle acquisitions). It's not impossible, just cost prohibitive. Ask yourself, What purpose does destroying a company serve to the greater cause of opensource? Is it legally viable, sure, but is it worth it, morally?

All that to say, I wish people would stop trying to co-opt grand ideals and sugar coating these types of cases. The plaintiff has sued the living hell out of everyone because, legally, they can. In turn, those actions makes settlement more likely, since the upstream infringer is now getting complaints from his clients and costs are rapidly mounting up. Was it legal? Sure. Was it moral and in-line with the opensource movement's ideals? Well, that really depends on what side of the line you fall on. But regardless of where you are on that line, is possibly destroying the lives (yes, personal lives) of the what amounts to companies that did nothing more than purchase a product that they thought was legitimate worth the results? I can attest that plenty of clients have gone bankrupt, been forced into divorces, or killed themselves from lawsuits filed against them (see Aaron Swartz for an example). This type of case is no different. I just wish that the parties would have the respect to admit what they're doing and stop

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#### ▼ Re:Morality vs The Law (1)

pem (1013437) | yesterday | (#47663091)

The thing you have to remember is this:

The code in question is dual-licensed.

The code is not produced by a charity; it is produced by a business. From the perspective of a business, the GPL is a marketing tool -- a great marketing tool. "Here's the source; try it out! Talk to others who are using it! Just contact us if you want to merge it with your proprietary code and make money!"

Any business can use the GPL this way, and many have. Just because a business uses the GPL does not mean that their politics align with the FSF.

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Thank you for your analysis, but it seems to me that Ameriprise is not just a customer. They're also a distributor of GPLed software not in accordance with the GPL. It seems to me that the plaintiff would have every legal and moral right to at least get an injunction against further distribution. I don't know if there were any lawsuits against anybody for just receiving the software.

This is also a commercial case, since the software is dual-licensed. The plaintiff would normally have collected money on every copy of the software distributed in a non-GPL fashion, and may well want the license fees for all distributed copies.

Moreover, I'm quite confident that dinging Ameriprise is not going to personally bankrupt anybody. There are times when one might want to go easy on the litigation because of the effect it would have on people or small companies, but Ameriprise has profited enough from shady activity in the past\* that I'm not going to have sympathy with them.

\*Considering what I received as part of a class-action suit in response to something I paid \$500 for, I assume Ameriprise made loads on charging for financial advice to buy Ameriprise products even when the customer couldn't really afford them.



#### ▼ You sir, are being absurd (1)

**Zontar\_Thing\_From\_Ve (949321)** | 2 days ago | **(#47657185)** 

From the parent post:

There is rich detail about this matter that will come out during litigation. Please don't criticize until you understand all the facts.

When has knowing the facts ever stopped Slashdotters from criticizing? Sounds like somebody doesn't understand how things work around here.



#### **▼** Skeptic (0)

Anonymous Coward | 2 days ago | (#47657241)

Comments by attorney's in support their client are essentially meaningless. Even in criminal trials lawyers' remarks are not under oath and are better ignored. Similarly those who claim a deep understanding of both the facts and the law are naive. The only opinion that matters is the final disposition of the courts.

Reply Moderate

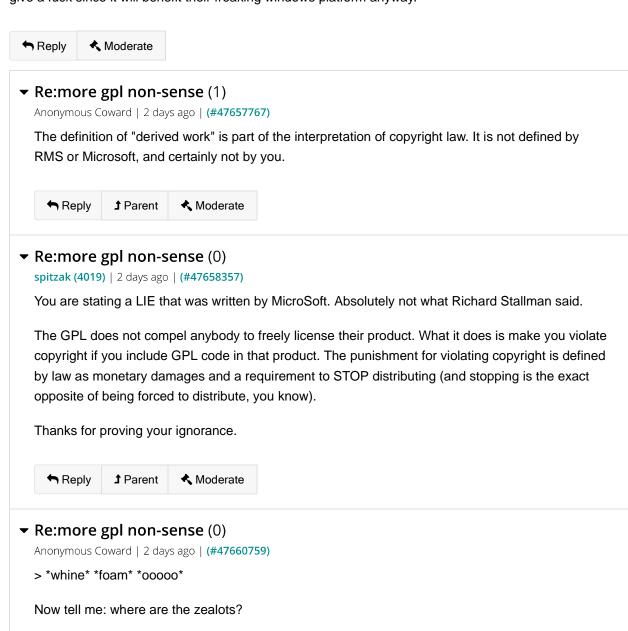
Reply

Moderate

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Except this is just nonsense and this method which is "child like" should not be protected under the law. The non-gpl code is not an extension or modification of the GPL source code no matter what the illogical gpl license states. Only a self important, child like, sociopath(richard stallman) would come up with a moronic method. The company should just release the GPL open source code portion and not the whole thing. The non-gpl becomes part of gpl because both touched, oooooooo? what is this shit kindergarten.

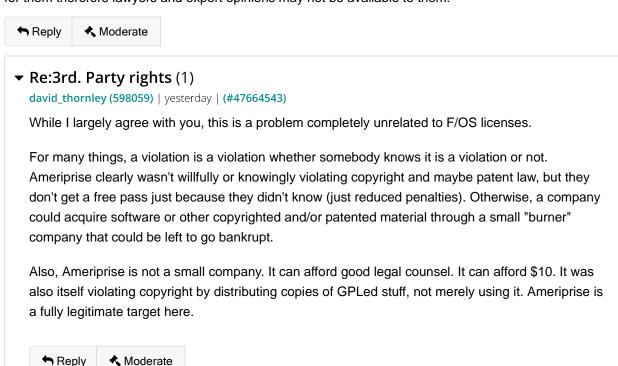
Even MS does not do stupid shit like this, you can static or dynamic link to their libraries and they don't give a fuck since it will benefit their freaking windows platform anyway.



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punishments or fines can take place there must be some evidence that a person is doing wrong knowingly. The intellectual property mess with all its complexity and legal issues should not be put upon the end user of the product who in many cases has no way to know or even find out if he is doing wrong. Keep in mind that many businesses are quite small and even a ten dollar expense can be a harsh issue for them therefore lawyers and expert opinions may not be available to them.

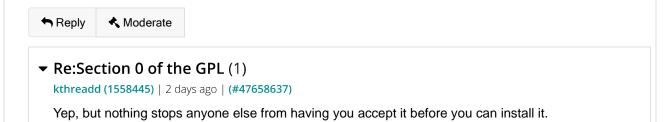


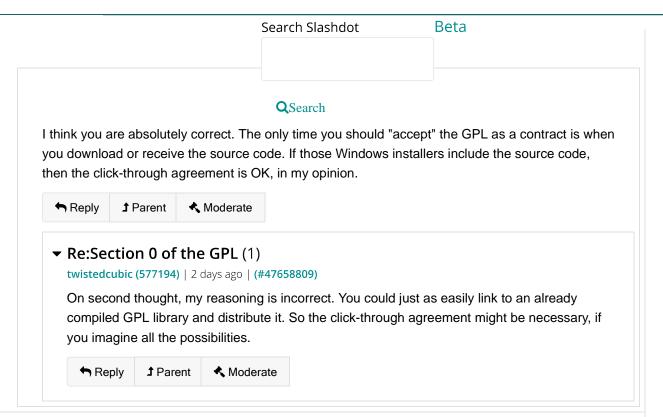
#### **▼** Section 0 of the GPL (0)

Anonymous Coward | 2 days ago | (#47657783)

[...] Section 0 of GPLv2, which says, "[t]he act of running the Program is not restricted." What that sentence actually means is just what it says: The GPLv2 copyright grant itself (which is all there is in GPLv2) does not restrict the act of running the program.

I've noticed that many installers for GPL software on Windows require me to accept the GPL license before I'm able to install the software on my computer. Given the quote above, I shouldn't have to accept the license to install and run it. I'm only subject to the license when I redistribute the software.





#### ▼ The code was available under a commercial license (1)

**DrJimbo (594231)** | 2 days ago | **(#47660505)** 

Versata chose to steal the code instead of licensing it under the commercial license or the GPL. Just because the GPL allowed the thieves to legally look at the code or use it unmodified does not magically transform this into a nightmare scenario. They are not being forced to either abandon their project or release their own code. They could just buy the commercial license like any responsible grownup would do.

The claim that this is a GPL nightmare scenario is just a stupid lawyer trick to try to fool people into blaming the victim instead of the unscrupulous bastards who stole the code and who still refuse to pay for it even after they were caught red-handed.

Think for a moment what would happen if the unscrupulous bastards prevail. The implications go far beyond the GPL. Imagine you let me see your commercial code without authorizing me to use it or copy it, perhaps through an NDA. Then I steal your code and put it in my products which I sell to a bunch of people. I get caught red handed and I still refuse to pay. Instead I hire a sleaze-ball lawyer who claims this is a nightmare scenario for commercial software licenses and NDAs. If the UBs win here, my lawyer's job becomes much easier because she can use this case as precedent. ISTM a win by the UBs would create a world where simply letting someone see your code dissolves any rights you have to that code.



#### ▼ A reply to the enumerated points (1)

WorBlux (1751716) | 2 days ago | (#47660973)

1. Implied - Not directly expressed.

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patent license for that task even if not patent was specifically mentioned. If Microsoft entered into a contract with me to manufacture android devices for their employees, that can't turn around a sue me for patent infringement of those specific enumerated devices on the purchase order. In the purchase contract it is implied Microsoft gives me permission to do those things reasonably required to fulfill the contract.

The is precedent I assume of using the principle of estoppel as a defense against patent claims. And estoppel may be implied. Ergo implications of representations made by a person may estopped patent claims against other persons.

2. The contract must be judged by it's actual language rather than ex-post-facto assertions of it's authors. It is the interpretation they would like to see in the courts, though not indicative of current law.

It may be true the FSF believes running a program is not a copyright issue, however there are precedents that claim loading a program into RAM constitutes a copying under the meaning or 106, especially if done by a licensee of a copy rather than an owner. A licensee being differentiated by having significant restrictions places on their ability to redistribute to transfer the copy of the work. The GPL does put significant limitations on this act, Section 4 specifically forbids you to "copy, modify, sublicense, or distribute the Program except as expressly provided under this License"

But this point is irrelevant. The GPL is not a copyright grant it is a license contract giving permission under certain conditions to do certain things that would otherwise be illegal. The GPL could have said that use of the program is not restricted by this license, but is simply says not restricted.

3. Section 8. allows the Original Copyright holder to expressly exclude distribution on such jurisdictional basis, why was this not done?

Anyways that's not quite what I think section 7 implies. If you agree not to distribute or use the program outside a license agreement, you may not longer distribute under the GPL unless royalty-free licenses are granted downstream. If there is a judicial ruling that the software infringes then you may not distribute it (under this license at least).

So with section 8 available (but not taken), then it must be presumed Ximpleware's distribution really did give a full GPL license to those receivers in the U.S., without additional restrictions. Now if the programs was distributed in violation of the GPL then it could be considered and inducement to infringe.

Having transmitted the program under a license in which no restrictions are placed on use of the program, Ximpleware is estopped from asking for judicial relief that would be a restriction on the use of the program.

Even in the case of the accusation patent infringement the GPL the GPL makes no termination of right.. The GPL just clarifies that distribution under the GPL may only only happen when in full compliance with the GPL; if for some reason you are legally unable to fully comply then you must forgo distribution.

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#### **Q**Search

party receiving the license from Ximpleware, they to have the implied patent license from the no restrictions on use clause. To distribute under the GPL is to represent that you are imposing no restrictions on the use of the program.

## ▼ Re:A reply to the enumerated points (1)

david\_thornley (598059) | yesterday | (#47664687)

The GPL has generally been held to be a copyright license, and that disregarding it is a copyright violation.

The law on loading into RAM or whatever is, IIRC, that copyright is not infringed by copying necessary for use of software obtained legally. Personally, I think it should be legal regardless (I'm not liable for copying words into my retina or brain if I'm reading an illegally copied book), but that's another topic. There's also the question of what the plaintiff is suing for; if a plaintiff is not going to sue for such copying (and some are), it doesn't matter.

Section 7 is the "liberty or death" provision. It is intended to keep the GPL pure. If you can't distribute without more restrictions than the GPL allows, then you can't distribute under the GPL. This would apply if the recipient had to get any sort of license, or was restricted in any sort of use, or something like that.

Section 8 is an option available for the copyright holder. The idea is that, if redistribution is not allowed in the US, but would be in Europe, the copyright holder could put such a geographic restriction into the license and still be in GPL compliance. It is not required, and has absolutely nothing to do with this case.

XimpleWare's distribution did in fact give a valid GPLv2 license to anybody without additional restrictions. You or I could use it freely, if we could acquire a copy. It did not give a valid license to redistribute in violation of the license, and since both Versata and Ameriprise were distributing not in accordance with the GPLv2 they were violating copyright. I was unaware that XimpleWare was suing any actual user (as opposed to redistributor) on the basis of copyright. The GPL itself says that there is nothing wrong with using GPLed software without intending to comply with the conditions. Patent law is somewhat different. While it could be argued that there's estoppel on suing for patent violations if the software is distributed according to the GPLv2, this wouldn't apply to software distributed in violation.

The license termination clause is section 4 of GPLv2. Versata does not have a license to use XimpleWare's code under the GPL, unless reinstated by XimpleWare. This does not affect the rights of people who received copies from Versata, but it doesn't free them from GPLv2 restrictions either.

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<b>←</b> Reply	<b>≮</b> Moderate		
darkonc (472 Versata cla protected b	y the commerci	#47668679) ection for a Closed-Source product is al license, even though they refused t	as obscene as them claiming to be to ever write a cheque. The principle is ense (be it code relicensing or cheque
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check for more

A language that doesn't affect the way you think about programming is not worth knowing.

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